No. 90-332

Supreme Court, U.S.
FILED
AUG 22 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

GEORGIA STATE BOARD OF ELECTIONS and MAX CLELAND, Secretary of State and Chairman of the Georgia State Board of Elections,

Appellants,

versus

TYRONE BROOKS, LANETT STANLEY, BILLY McKINNEY, JOE BEASLEY, VENUS E. HOLMES, MICHAEL ROBINSON, EDWARD BROWN, REV. DR. WILLIAM HOWELL, JOHN WHITE, MARY YOUNG-CUMMINGS, MARY BLACK, WILLIE MAYS, WILLIAM YOUNG, DEANIE FRAZIER, DIANE HARVEY-JOHNSON, REV. G.L. AVERY, JUANITA T. WILLIAMS, PATRICIA C. JONES, EDITH INGRAM GRANT, HENRY COOK, ANNIE SMITH, AND ERCEL BALDWIN,

Appellees.

On Appeal from the United States District Court for the Southern District of Georgia

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I. WHETHER SECTION 5 OF THE VOTING RIGHTS ACT SHOULD BE EXPANDED TO ALLOW THE DEPARTMENT OF JUSTICE PLENARY AUTHORITY TO REVIEW ALL OF A STATE'S ELECTION PRACTICES, EVEN THOUGH THOSE PRACTICES WERE ADOPTED BEFORE THE EFFECTIVE DATE OF SECTION 5, AND EVEN THOUGH THERE HAS BEEN NO CHANGE IN THE METHOD OF ELECTING THE JUDICIAL OFFICES AT ISSUE.

II. WHETHER SECTION 5 OF THE VOTING RIGHTS ACT SHOULD BE CONSTRUED TO IMPOSE AN AFFIRMATIVE DUTY ON COVERED JURISDICTIONS TO CHANGE LONGSTANDING VOTING PRACTICES IN ORDER TO MAXIMIZE MINORITY VOTING STRENGTH IN JUDICIAL ELECTIONS, EVEN THOUGH BLACK CANDIDATES HAVE WON NEARLY EVERY ELECTION IN WHICH THEY HAVE RUN.

III. WHETHER THE VOTING RIGHTS ACT SHOULD BE CONSTRUED TO APPLY TO THE ELECTION OF JUDGES.

PARTIES

All parties to the proceeding below are listed in the caption on the cover.

TABLE OF CONTENTS

Page

Questions Presented i

Parties ii

Opinions Below 2

Jurisdiction 2

Statutory Provisions Involved 3

STATEMENT OF THE CASE 3

Proceedings Below 3

Statement of Facts 4

SUBSTANTIALITY OF THE QUESTIONS PRESENTED 10

I. SECTION 5 OF THE VOTING RIGHTS ACT SHOULD NOT BE EXPANDED TO ALLOW THE DEPARTMENT OF JUSTICE PLENARY AUTHORITY TO REVIEW ALL OF A STATE'S ELECTION PRACTICES, WHERE THOSE PRACTICES WERE ADOPTED BEFORE THE EFFECTIVE DATE OF THE SECTION 5 PRECLEARANCE STATUTE, AND WHERE THERE HAS BEEN NO ACTUAL CHANGE IN THE METHOD OF ELECTING THE OFFICES AT ISSUE 10

TABLE OF CONTENTS – Continued

Page

II. SECTION 5 OF THE VOTING RIGHTS ACT SHOULD NOT BE CONSTRUED TO IMPOSE AN AFFIRMATIVE DUTY ON COVERED JURISDICTIONS TO CHANGE LONG-STANDING VOTING PRACTICES SOLELY IN ORDER TO MAXIMIZE MINORITY VOTING STRENGTH, PARTICULARLY WHERE BLACK CANDIDATES HAVE WON NEARLY EVERY ELECTION IN WHICH THEY HAVE RUN 18

III. THE VOTING RIGHTS ACT SHOULD NOT BE CONSTRUED TO APPLY TO THE ELECTION OF JUDGES OF THE COURTS OF THE STATES 19

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Allen v. Board of Education, 393 U.S. 544 (1969) 13

Beer v. United States, 425 U.S. 130 (1976) 12, 17

Boyle v. Landry, 401 U.S. 77 (1971) 21

Buchanan v. Rhodes, 249 F.Supp. 860 (N.D. Ohio), appeal dismissed, 385 U.S. 3 (1966) 21

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 19

City of Richmond v. United States, 422 U.S. 358, 371 (1975) 20

Dougherty County Board of Education v. White, 439 U.S. 32, 48 (1978).....10, 11

Fusari v. Steinberg, 419 U.S. 379, 388-89 (1975) 19

Haith v. Martin, 477 U.S. 901 (1986) 19

Holshouser v. Scott, 335 F.Supp. 928, 932 (M.D. N.C. 1971), aff'd, 409 U.S. 807 (1972)..... 20

League of United Latin American Citizens Council v. Clements, 902 F.2d 293 (5th Cir. 1990) 20

McCain v. Lybrand, 465 U.S. 236, 244 (1954)..... 10

South Carolina v. Katzenbach, 383 U.S. 301, 344 (1966) 10, 11

Thornburg v. Gingles, 478 U.S. 30 (1986) 20

TABLE OF AUTHORITIES – Continued

Page

United States v. Sheffield Board of Commissioners, 435 U.S. 110 (1978) 11

Ward Cove Packing, Inc. v. Antonio, 109 S.Ct. 2115, 490 U.S. ___, 104 L.Ed.2d 733 (1989) 19

Wells v. Edwards, 347 F.Supp. 453 (M.D. La. (1972), aff'd, 409 U.S. 1095 (1973) 20

Younger v. Harris, 401 U.S. 37 (1971) 21

STATUTES

42 U.S.C. §1973c ..... *passim*

O.C.G.A. §21-2-501 ..... 3, 6

O.C.G.A. §21-2-135 7

No. _____

In The

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October Term, 1990

GEORGIA STATE BOARD OF ELECTIONS and MAX CLELAND, Secretary of State and Chairman of the Georgia State Board of Elections,

Appellants,

versus

TYRONE BROOKS, LANETT STANLEY, BILLY McKINNEY, JOE BEASLEY, VENUS E. HOLMES, MICHAEL ROBINSON, EDWARD BROWN, REV. DR. WILLIAM HOWELL, JOHN WHITE, MARY YOUNG-CUMMINGS, MARY BLACK, WILLIE MAYS, WILLIAM YOUNG, DEANIE FRAZIER, DIANE HARVEY-JOHNSON, REV. G.L. AVERY, JUANITA T. WILLIAMS, PATRICIA C. JONES, EDITH INGRAM GRANT, HENRY COOK, ANNIE SMITH, AND ERCEL BALDWIN,

Appellees.

On Appeal from the United States District Court for the Southern District of Georgia

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The memorandum opinion and order of the three judge panel of the United States District Court for the Southern District of Georgia granting plaintiffs' summary judgment and interim injunctive relief on the issue of whether or not the addition of new judgeships is a covered change under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c, is unreported and is reproduced in the separately bound appendix at App. 1.

The order of March 26, 1990 denying defendants' motion for reconsideration without prejudice is unreported and is reproduced at App. 46.

The order of May 29, 1990 which granted defendants' motion for reconsideration, modifying portions of the court's injunctive order, is unreported and is reproduced at App. 48.

The corrective order further modifying the injunctive relief, entered June 25, 1990, is reproduced at App. 54.

JURISDICTION

This is an appeal from orders of a three judge district court holding that the addition of new superior court judgeships is a covered change under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c. The three judge court was convened pursuant to 23 U.S.C. §2284, as required by 42 U.S.C. §1973c.

A final order was entered on May 29, 1990. Appellees' notice of appeal was filed on June 14, 1990 in the

district court. Appellants' notice of appeal was filed June 22, 1990 in the district court.

This court is authorized to hear this appeal by 28 U.S.C. §1253 and 42 U.S.C §1973c.

STATUTORY PROVISIONS INVOLVED

This appeal involves Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c. The text of this section is reproduced in pertinent part at App. 85.

The appeal also involves certain Georgia statutes that pertain to the method of electing public officers, to wit:

O.C.G.A. §21-2-501, which requires a majority of the votes to win nomination or election to all state and county offices in Georgia, and which is reproduced at App. 87;

O.C.G.A. §15-6-4.1, which requires that superior court judges be elected by all of the voters in their respective circuits, and which is reproduced at App. 90; and

O.C.G.A. §21-2-135, which requires that all state and county officers be elected to separately designated posts, and which is reproduced at App. 90.

STATEMENT OF THE CASE

Proceedings Below. The complaint in this action includes four causes of action. The first – which is the only one involved in this appeal – alleges that the addition of new superior court judgeships in the State of

Georgia requires preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, even though the method of electing these judges was not changed. The second, third and fourth causes of action, which are based on Section 2 of the Voting Rights Act, 42 U.S.C. §1973, and the United States Constitution, challenge the State's majority vote requirement; the requirement that superior court judges be elected by all of the voters within their respective circuits; the requirement that each judge be elected separately designated seats; and the requirement that judges reside in the geographical districts in which they are elected.

The plaintiffs filed motions for a preliminary injunction and summary judgment on their Section 5 claims, and on December 1, 1989, a three judge district court, with one judge dissenting, entered an order holding that all superior court judgeships added subsequent to November 1, 1964 (the effective date of Section 5 of the Voting Rights Act) required preclearance. The Honorable Phyllis Kravitch and B. Avant Edenfield comprised the majority; the Honorable Dudley Bowen, Jr. dissented. The court directed the defendants to complete a submission to the Department of Justice. That submission was completed and, on April 25, 1990, the Department of Justice issued its opinion. The Department objected to the addition of all new judgeships in any area of the State of Georgia where there was a significant black population. The District Court then entered orders on May 29, 1989 and June 25, 1990 providing final relief on the Section 5 claim.

Defendants filed their notice of appeal on June 22, 1990.

Statement of Facts. Superior courts in Georgia are the State's trial courts of general jurisdiction. They alone

have jurisdiction over equity cases, felony cases, domestic and custody cases, and certain other classes of cases. They also exercise a wide form of appellate and certiorari jurisdiction over inferior tribunals, administrative bodies, and local governmental bodies. *See* O.C.G.A. §15-6-8.

Each individual superior court seat in Georgia is authorized by an act of the legislature. As of November 1, 1964, the effective date of Section 5 of the Voting Rights Act, the General Assembly had authorized 59 superior court judgeships throughout the State. From 1965 through the 1988 session of the General Assembly, an additional 77 superior court judgeships were created and filled. In 1989 and 1990 together, an additional eleven superior court judgeships were authorized by the General Assembly, but ten of those positions remain vacant on account of the present litigation.

It is undisputed that each and every new judgeship in Georgia has been added since 1964 solely in order to meet the increasing civil and criminal caseload of the courts. (App. 63) *It is also undisputed that each and every new judgeship that has been added has been elected under precisely the same election procedures that were used before the addition of that judgeship.* (App. 59) In every instance, this system of election is the same system that prevailed in the State prior to the effective date of Section 5.

Ever since the creation of superior courts in the State of Georgia, which dates back two centuries, the State has been divided into separate superior court circuits.[1] Some

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[1] The number of superior court circuits have increased over the past 200 years as the State was settled, the population

(Continued on following page)

circuits in urban areas consist of one county, while other circuits are comprised of several counties. There has never been an instance in the history of the State where any county was split into two or more circuits.

Georgia's superior court judges have been elected by the voters for the past century. During this time, candidates for superior court have been nominated at primary elections by all of the voters who resided in each of the respective circuits. Since the adoption of Georgia's 1983 Constitution, judges have continued to be nominated at the time of the State's primary elections, but they are elected in non-partisan elections. They have continued, however, to be elected by all of the voters in each of the respective circuits.[2]

It is also undisputed that, prior to the effective date of Section 5, general statutes of state-wide application mandated that superior court judges be elected by a majority of the voters, with a run-off election between the top two candidates if no candidate received a majority at the initial election. *See* O.C.G.A. §21-2-501. General statutes of state-wide application similarly mandated, at all

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increased, and urban areas developed. There are currently 45 circuits in the State, several of which were created out of old circuits since November 1, 1964. The Department of Justice has precleared each of the post-November 1, 1964 circuits, and those changes present no issue in this appeal.

[2] Prior to a 1966 constitutional amendment, superior court judges were elected at the November general election by the voters of the entire State. As a practical matter, there was rarely, if ever, a contested general election for superior court prior to 1966. This change is not at issue in any way in this case.

times since the effective date of Section 5, that each individual seat on the courts be elected separately. *See* O.C.G.A. §21-2-135.

The undisputed evidence shows that there has been no discrimination in either the election or the appointment of superior court judges in the State of Georgia. While the percentage of superior court judges who are black is less than the percentage of the general population that is black, that difference is due entirely to the fact that the percentage of qualified persons[3] who are black is much less than the percentage of blacks in the general population.

At the time of the District Court's order, six of the 137 incumbent superior court judges were black (i.e., 4.4 percent). This number exceeded the percentage of black lawyers in the State of Georgia (three percent), and it significantly exceeded the percentage of lawyers who were black *and* who satisfied the minimum seven year practice requirement. (App. 74-75, 93)

The lower court did not find, nor could it have found, that the method of electing superior court judges had somehow discriminated against black judicial candidates in Georgia. At the time of the District Court's decision, there had been nine judicial elections in which black and white candidates had opposed one another, including a state-wide election for the Court of Appeals,

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[3] The Georgia Constitution requires that superior court judges be members of the Bar for seven years or more. *See* Ga. Const. Art. VI, Sec. VII, Par. II(a). Plaintiffs have not alleged that this requirement is discriminatory.

several superior court elections, and several state court elections. *The black candidate won seven of these nine races.*[4] In fourteen additional elections, black candidates for state and superior court judgeships had been elected without opposition. (App. 70-71) (The most recent judicial elections in the State, which occurred on July 17, 1990, yielded two more successful black state-wide candidacies, one for the State Court of Appeals, and one for the State Supreme Court. Each of these prevailing black candidates had white opposition.)

Because approximately 70 percent of all incumbent superior court judges in Georgia were initially appointed to a vacancy on the bench, an assessment of Georgia's electoral practices should also consider the history of judicial appointments. These appointments are made by the Governor upon the recommendation of the Judicial Nominating Commission (JNC), a Commission that has been in place since 1973. When there is a vacancy, the JNC publicizes that fact and receives applications from anyone who chooses to apply. Again, no one could suggest that there has been racial discrimination in this appointment process. To the contrary, black lawyers who applied for superior court positions enjoyed a success rate approximately 50 percent higher than that of white applicants. (App. 73-74, 94-95)

Notwithstanding the fact that the method of electing superior court judges remained unchanged, and notwithstanding the absence of any evidence of discrimination in

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[4] In an eighth, the black candidate was unsuccessful, but neither did he carry a majority of the black voters.

the election or appointment of superior court judges in Georgia, the District Court nevertheless held that the mere addition of new judgeships alone required Section 5 preclearance. Pursuant to the directions of the District Court, the State of Georgia therefore completed a submission to the Department of Justice of the additional post-1964 judgeships at issue. The Department did not find, nor could it have found, that the addition of these judgeships was somehow racially discriminatory, nor did the Department suggest that black voters were in any way disadvantaged by the creation of new judgeships. Still, the Department objected to the creation of every new judgeship in each circuit that had a significant black population.

The stated basis for this objection had nothing to do with any change in electoral practices. Rather, the basis of the objection was the allegation that Georgia's state-wide majority vote requirement might be racially discriminatory. (App. 80) As a matter of fact, however, that requirement had been adopted *before* the effective date of Section 5, and it therefore had not been submitted to the Department of Justice for review, nor could it have been.

The District Court then entered final relief based on the Justice Department's objection providing that the additional superior court judges would "cease to exist" if they were not ultimately precleared in a Section 5 preclearance action in the District Court for the District of Columbia. (App. 48-50)

SUBSTANTIALITY OF THE QUESTIONS PRESENTED.

I. SECTION 5 OF THE VOTING RIGHTS ACT SHOULD NOT BE EXPANDED TO ALLOW THE DEPARTMENT OF JUSTICE PLENARY AUTHORITY TO REVIEW ALL OF A STATE'S ELECTION PRACTICES, WHERE THOSE PRACTICES WERE ADOPTED BEFORE THE EFFECTIVE DATE OF THE SECTION 5 PRECLEARANCE STATUTE, AND WERE THERE HAS BEEN NO ACTUAL CHANGE IN THE METHOD OF ELECTING THE OFFICES AT ISSUE.

Section 5 of the Voting Rights Act is the most extreme intrusion into state authority of any statute enacted by Congress. It divests all "covered jurisdictions," including Georgia and several other states, of the power to change their election practices from what was in effect on November 1, 1964, unless prior approval is first received from the Department of Justice or a three-judge district court in the District of Columbia. This Court has described Section 5 as "certainly the most extraordinary" provision of the Voting Rights Act, *McCain v. Lybrand*, 465 U.S. 236, 244 (1954), and "an uncommon exercise of Congressional power." *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966). Section 5 reflects a "substantial departure . . . from the ordinary concepts of our federal system." *Dougherty County Board of Education v. White*, 439 U.S. 32, 48 (1978). (Justice Powell quoting from legislative history).

The original purpose of the statute was a relatively simple and narrow one. It was designed to ensure that the southern states, once literacy tests were banned, did not adopt any new "test or device" as a prerequisite to voter registration that might have a racially exclusionary

effect. *South Carolina v. Katzenbach, supra.* Through a series of decisions that broadly construed Section 5, the statute was expanded significantly beyond its original purpose. *United States v. Sheffield Board of Commissioners,* 435 U.S. 110, 140-50 (1978) (dissenting opinion of Justice Stevens, joined by Chief Justice Burger and Justice Rehnquist, noting that the scope of Section 5 had been expanded far beyond the purposes conceived by Congress); *Dougherty County Board of Education v. White,* 439 U.S. 32, 47 (1978) (Stevens, J., concurring).

Whatever may have been the proper reach of Section 5 in other cases, however, the divided opinion of the District Court here, if affirmed, would extend Section 5 far beyond anything contemplated before. The question presented here is a substantial one, not only for the State of Georgia because of the grave intrusion into the State's judicial system, but for all covered jurisdictions because this extraordinary expansion of Section 5 would call into question all of their election laws, no matter when enacted, if the judgment of the District Court is not reversed.

The justification for the stringent remedy of Section 5 is that the election laws of covered jurisdictions could be temporarily frozen in place until any *changes* might first be reviewed for the possibility of discrimination by the Department of Justice or the District of Columbia District Court. The majority opinion of the District Court here would carry that confined remedy to a whole new and unjustified realm.

Not a single election practice in this instance has been changed. New superior court judges are elected

precisely as were all pre-existing superior court judges. To now allow the Department of Justice to have review power under Section 5 of all electoral practices of the State – regardless of how long they have been in place – would be a tremendous and wholly unwarranted expansion of Section 5 jurisdiction, divorced from the statute's purpose. That purpose, as explained by this Court, is to avoid *changes* in electoral practices that place minorities in a weaker political position than they were before. *Beer v. United States*, 425 U.S. 130 (1976).

> By prohibiting the enforcement of a voting-procedure change until it has been demonstrated to the United States Department of Justice or to a three-judge federal court that the change does not have a discriminatory effect, Congress desired to prevent states from "undoing or defeating the rights recently won" by Negroes. Section 5 was intended "to ensure that the gains thus far achieved in minority political participation shall not be destroyed through new discriminatory procedures and techniques." *Beer v. United States*, 425 U.S. at 140-41.

Since new election procedures have not been used in connection with any of the new superior court judgeships, one cannot suggest that there is any possibility here of "undoing or defeating" any political "rights or gains" otherwise enjoyed by blacks. To the contrary, since each new judgeship is an exact replication of the preexisting judgeships in that circuit, no decrease or change in minority voting strength conceivably occurs. There is no possibility of the kind of "retrogression" of black voting strength that is the focus of Section 5. *Beer v. United States, supra.* There being no "*new* procedure or technique" here, and there being no conceivable change in black voting

strength, the extraordinary requirement of Section 5 review should not be required.

The kind of extreme consequences that flow from the District Court's holding are apparent simply by looking at what happened when the Justice Department performed its "review" here. Based on the notion that the addition of each new judgeship bestowed on the Department the authority to review the method of electing that judgeship – even though there was no change from the way previous judgeships had been elected – the Department here objected to all of Georgia's new judgeships that were located in circuits with significant black populations.

The Department's objection was not in any way predicated upon any change in how superior court judges are elected, but *solely* upon criticisms of the State's pre-Section 5 majority vote law that mandates majority voting in *all* state elections. (App. 80) Since that law was enacted before the effective date of Section 5, however, the mere adherence to it should not constitute a "change" that is subject to Section 5 scrutiny. The State did not even submit the issue of majority voting to the Department when the new judgeships were submitted precisely because this requirement was mandated by a pre-Section 5 state law. Indeed, any deviation from the majority vote law for the new judgeships would have been a "change" requiring preclearance. *See Allen v. Board of Education,* 393 U.S. 544 (1969).

The plain effect of the District Court's opinion in this case is to expand the scope of Section 5 review from

election practices that are actual changes from the practices in effect on November 1, 1964 to include review, and potential objections to, each and every election practice in the State that existed before that date as well. Even precleared changes become "*re*-reviewable" in subsequent Section 5 proceedings under the District Court's opinion since all of a State's election practices are subject to attack in any Section 5 submission.[5]

The fallacy of the District Court's majority opinion is apparent. The court concluded that the addition of new judgeships triggered plenary Section 5 review by reasoning that the Georgia General Assembly could conceivably have used voting procedures for new judgeships that might have been more favorable to blacks than the existing procedures.[6] In essence, the majority opinion held that even the continued adherence to, and implementation of, election practices that preexisted Section 5 may require further Section 5 review. This is so, according to the lower court, because the State could have deviated from those practices, and because there were a variety of

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[5] For example, the State's mandate of majority voting in all county elections became effective in 1965, and this requirement therefore was submitted to and approved by the Justice Department under Section 5. But under the District Court's holding, this requirement remains *re*-reviewable and objectionable whenever it is adhered to when new public officers are added.

[6] Specifically, the District Court noted that one could argue that plurality voting could be more favorable to black voters. (App. 13)

potential ways of electing the office at issue. Section 5 review is thus required by the District Court so that the Justice Department can determine whether minority voting strength has been *maximized*.

The District Court's reasoning makes meaningless the idea of "electoral changes." Every future implementation of established state-wide practices becomes a Section 5 reviewable "change" under its analysis, and Section 5 becomes extended to allow objections to a State's election practices whether they were actually changed or not. Congress surely never contemplated any such broad and unrestricted jurisdiction under Section 5 over all of a State's election practices, no matter when adopted. So long as a State continues to follow its existing practices, it should not be subject to additional Section 5 review.

If the United States contends that election practices in effect prior to November 1, 1964 are discriminatory, its remedy is not to make objections under Section 5, as the Department of Justice has done here. Rather, its sole remedy is to bring an action where it may attempt to show that the practice it objects to in fact violates the Constitution or some statutory provision.[7]

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[7] Indeed, in this very case, the plaintiffs here and the United States have recently filed actions challenging majority voting in the State of Georgia in the United States District Court for the Northern District of Georgia. That is the proper forum and procedure for resolving allegations that an election practice in the State that has not been changed since November 1, 1964, is discriminatory. The District Court here incorrectly held that such longstanding practices are also reviewable and objectionable in a Section 5 proceeding.

The District Court's construction of what constitutes a covered change is unprecedented. This Court has never before held that a State should be subjected to plenary Section 5 review merely because it adds a new judgeship, or any other public officer, where the election of that official is conducted pursuant to election practices that have long been followed in the State and which, in fact, are *mandated* by the Section 5 prohibition against changing electoral practices. Judge Bowen, in dissent, agreed with the defendants that there was no change in this case which required preclearance since the method of electing each new superior court judgeship had remained the same as it was before November 1, 1964.

The District Court's error in this case may also be seen by considering what other kinds of objections to Georgia's election laws are authorized by the opinion. Based on the idea that the mere addition of a new judgeship allows the Department of Justice to object to any election practice used in electing that judgeship – even if they are the same practices that were used before November 1, 1964 – there is no limit to the extent of the review and objection power of the Department. For example, in this instance, the Attorney General would have been equally empowered to object to any voter registration or other electoral practice of the State that he believed decreased black political power. He might have concluded, for example, that lowering the voting age or permitting convicted felons to vote would have increased the percentage of eligible voters in the State who were black; that changing voter registration procedures might

have made voting more accessible to blacks; that increasing the number of polling places or changing their location might have been beneficial to black voters; or that any number of other changes might increase black voting strength. It would be no different to object to any of these practices in the context of new judgeship elections than to object to the State's majority vote requirement.

Under the District Court's theory that the mere addition of a new judgeship triggers plenary Section 5 review over all aspects of the State's election laws and practices that form any part of the election process, there is no limit to what the Department of Justice could object to. Section 5 review would be carried far beyond the narrow "freezing remedy" contemplated by Congress.

The State's interpretation of Section 5 is entirely consistent with the purpose of that law. Section 5 was never intended to give the Attorney General, or the District Court for the District of Columbia, roving, plenary power to review, enjoin, or modify every election practice that might exist in covered jurisdictions. The sole purpose of the provision was to ensure that advances by black voters would not be taken away by some *new* "procedure," some *new* "voting qualification," or some *new* "prerequisite to voting." 425 U.S. at 140-41. Section 5 should have nothing whatsoever to do with a State that simply continues to follow the mandate of its own state-wide laws and practices that were in effect before November 1, 1964.

II. SECTION 5 OF THE VOTING RIGHTS ACT SHOULD NOT BE CONSTRUED TO IMPOSE AN AFFIRMATIVE DUTY ON COVERED JURISDICTIONS TO CHANGE LONGSTANDING VOTING PRACTICES SOLELY IN ORDER TO MAXIMIZE MINORITY VOTING STRENGTH, PARTICULARLY WHERE BLACK CANDIDATES HAVE WON NEARLY EVERY ELECTION IN WHICH THEY HAVE RUN.

As shown in Part I, the District Court erroneously decided that the addition of new judgeships authorized plenary Section 5 review by reasoning that Georgia could have used different voting procedures that conceivably might be more favorable to black candidates. To hold that the possibility of such a change creates a Section 5 issue ignores the prerequisite that, to constitute a "covered change," an electoral practice must be different than what was in place on November 1, 1964. Even more fundamentally, however, the District Court's holding imposes an affirmative duty on States to maximize minority political strength that cannot be reconciled with the purpose of Section 5.

Under the court's ruling, instead of prohibiting States from adopting some new discriminatory device, Section 5 would be turned on its head to *affirmatively mandate new electoral practices* designed solely to maximize minority voting strength. There is no basis in law or logic for such an extraordinary extension of Section 5. Nor is there any place in a case such as this one – where the evidence shows that black candidates have suffered no discrimination – for imposing such an affirmative duty on a State to change longstanding, legitimate election practices.

The State of Georgia, consistent with Section 5, should be allowed to increase the size of its judiciary without Section 5 involvement *so long as* the State continues to use the same election practices that were in effect for preexisting judgeships. Section 5 should not be construed to require a State to affirmatively rewrite its election practices as a *quid pro quo* for simply adding new superior court judgeships. Section 5 contains no such affirmative duty to change the laws of a covered jurisdiction, and it should not be construed to find a Section 5 violation simply because a State has declined to change its laws.

Such an affirmative duty bears no relation to the underlying "freezing principle" of Section 5. *Beer v. United States, supra.* And such an affirmative duty cannot be justified where actual election results refute any suggestion of discrimination. *See, e.g., Ward Cove Packing, Inc. v. Antonio,* 109 S.Ct. 2115, 490 U.S. ___, 104 L.Ed.2d 733 (1989); *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989).

III. THE VOTING RIGHTS ACT SHOULD NOT BE CONSTRUED TO APPLY TO THE ELECTION OF JUDGES OF THE COURTS OF THE STATES.

This Court has previously held, through summary affirmance of a district court judgment, that Section 5 of the Voting Rights Act covers the election of judges. *Haith v. Martin,* 477 U.S. 901 (1986), affirming, 618 F.Supp. 410 (E.D.N.C.). That summary affirmance, of course, has only limited precedential significance in the Court. *Fusari v. Steinberg,* 419 U.S. 379, 388-89 n. 15, 391-92 (1975). Defendants respectfully submit that the question of whether

judges are covered by the Voting Rights Act is a substantial question that merits this Court's full consideration. Significant litigation is pending in various states under Section 2 and Section 5 of the Voting Rights Act concerning the method of electing judges, *see, e.g., League of United Latin American Citizens Council v. Clements,* 902 F.2d 293 (5th Cir. 1990), pending en banc consideration, and a definitive decision from this Court on this issue would be of tremendous guidance to state legislatures and the lower federal courts.

Although appellants would more fully brief this issue if the Court accepts jurisdiction of it, they contend that the congressional history and the Court's previous interpretations of the Voting Rights Act support the view that the Act was never intended to apply to judicial offices. *See, e.g., City of Richmond v. United States,* 422 U.S. 358, 371 (1975) (a practice is "discriminatory" when the result of that practice is that the *governing body* to be elected does not "fairly reflect minority voting strength."). *See also Thornburg v. Gingles,* 478 U.S. 30, 42 (1986). Where a practice cannot result in "a denial of a minority group's opportunity to elect *representatives* of their choice," *see* 42 U.S.C. §1973, it should not be covered under the Voting Rights Act. Judges are not representatives, but are instead holders of an office that must be treated differently than legislatures, city councils or county commissions that do *represent* the electorate. *See, e.g., Wells v. Edwards,* 347 F.Supp. 453 (M.D. La. 1972), aff'd, 409 U.S. 1095 (1973) (judges are not subject to fourteenth amendment one-person/one-vote requirement); *Holshouser v. Scott,* 335 F.Supp. 928, 932 (M.D. N.C. 1971), aff'd, 409 U.S. 807

(1972); *Buchanan v. Rhodes*, 249 F.Supp. 860 (N.D. Ohio), appeal dismissed, 385 U.S. 3 (1966).

Defendants contend that the intrusive conditions of Section 5 – with its preclearance requirements, its shift of jurisdiction from local district courts to the District Court for the District of Columbia, and the great costs associated with these conditions – support the conclusion that Congress never intended that a state's judicial system should be so disrupted by federal supervision. This Court has long held that basic principles of federalism require that a state's judicial system not be hampered by unwarranted federal disruption, absent specific and clear congressional authority. *E.g., Younger v. Harris*, 401 U.S. 37 (1971); *Boyle v. Landry*, 401 U.S. 77 (1971).

CONCLUSION

For the foregoing reasons, the State of Georgia respectfully submits that the questions it presents are substantial, and the State requests that this Court docket this appeal for full hearing and consideration.

Respectfully submitted,

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TABLE OF CONTENTS

Page

District Court Memorandum Opinion and Order of December 1, 1989, Including Dissenting Opinion of the Honorable Dudley Dowen, Jr. ..... App. 1

Court Order of March 26, 1990 Denying Defendants' Motion for Reconsideration Without Prejudice ..... App. 46

District Court Order of May 29, 1990 Granting Defendants' Motion for Reconsideration ..... App. 48

District Court's Corrective Order of June 25, 1990 ..... App. 54

Defendants' Notice of Appeal to the Supreme Court, Filed on June 22, 1990 ..... App. 56

Submission Letter of Georgia Attorney General Michael Bowers of Additional Judgeships Pursuant to Section 5, Dated December 29, 1989 ..... App. 58

Objection Letter of Department of Justice to Addition of New Superior Court Judgeships, Dated April 25, 1990 ..... App. 77

28 U.S.C. §1253 ..... App. 84

Section 5 of the Voting Rights Act of 1965, as Amended, 42 U.S.C. §1973c ..... App. 85

O.C.G.A. § 21-2-501 ..... App. 87

O.C.G.A. § 15-6-4.1 ..... App. 90

O.C.G.A. § 21-2-135 ..... App. 90

Affidavit of Professor Charles S. Bullock, III Submitted in Opposition to Plaintiff's Request for Preliminary Injunction Filed on June 26, 1989 ..... App. 92

No. _____

In The

Supreme Court of the United States

October Term, 1990

GEORGIA STATE BOARD OF ELECTIONS and MAX CLELAND, Secretary of State and Chairman of the Georgia State Board of Elections,

Appellants,

versus

TYRONE BROOKS, LANETT STANLEY, BILLY McKINNEY, JOE BEASLEY, VENUS E. HOLMES, MICHAEL ROBINSON, EDWARD BROWN, REV. DR. WILLIAM HOWELL, JOHN WHITE, MARY YOUNG-CUMMINGS, MARY BLACK, WILLIE MAYS, WILLIAM YOUNG, DEANIE FRAZIER, DIANE HARVEY-JOHNSON, REV. G.L. AVERY, JUANITA T. WILLIAMS, PATRICIA C. JONES, EDITH INGRAM GRANT, HENRY COOK, ANNIE SMITH, and ERCEL BALDWIN,

Appellees.

On Appeal From The United States District Court For The Southern District Of Georgia

APPENDIX TO JURISDICTIONAL STATEMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

TYRONE BROOKS, et al., Plaintiffs,	)	CIVIL ACTION FILE
versus	)	NO. CV288-146
STATE BOARD OF ELECTIONS, et al.,	)	FILED DEC 1 '89
Defendants.	)	

Before KRAVITCH, Circuit Judge, EDENFIELD and BOWEN, District Judges.

MEMORANDUM OPINION AND ORDER

On July 13, 1988 plaintiffs commenced this action alleging violations of sections 2 and 5 of the Voting Rights Act of 1964 (currently codified as amended at 42 U.S.C. §§ 1973 and 1973c, respectively), as well as provisions of the first, thirteenth, fourteenth, and fifteenth amendments to the United States Constitution. The plaintiffs are black voters of Georgia, some of whom are elected officials of various Georgia counties, suing for themselves and on behalf of those similarly situated.[1]

Defendants do not contest class certification or standing.[2] The defendants are the Georgia State Board of Elections and Max Cleland, Secretary of State and Chairman of the Georgia State Board of Elections.[3] A three-judge district court was convened to consider the alleged violations of section 5 of the Voting Rights Act. *See* 42 U.S.C. § 1973c; 28 U.S.C § 2284. Currently before the court is

plaintiffs' motion for summary judgment and injunctive relief.

I.

Since August 7, 1965 Georgia has been a "covered jurisdiction" within the meaning of section 5 of the Voting Rights Act. 28 C.F.R. § 51 app. (1988); 30 Fed. Reg. 9897 (1965). As a covered jurisdiction, Georgia must administratively preclear "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964" with the Attorney General of the United States or institute a declaratory judgment action in the District Court for the District of Columbia. *See* 42 U.S.C. § 1973c.[4]

From 1964 to 1988, Georgia enacted 80 statutes regarding the election of superior court judges. All told, seventy-seven judgeships and five new circuits were created. The State submitted these to the Attorney General for preclearance on June 27 and 28, 1988. By letter of August 26, 1988 the Attorney General notified the State that he did not object to thirty-one of the proposed changes. Thus, twenty-nine of the seventy-seven new judgeships and three of the five new circuits were precleared. *See* Appendix A. In the same letter the Attorney General requested more information regarding the remaining changes.[5] The State submitted some further information, but chose not to comply fully with the Attorney General's request.

In order to obtain preclearance under section 5 of the Voting Rights Act, the State, as the submitting authority,

has the burden of showing that a submitted change has neither a discriminatory purpose nor effect. *See e.g., Georgia v. United States*, 411 U.S. 526, 93 S.Ct. 1702, 36 L.E.2d 472 (1973). Because the State deliberately chose not to comply with the Attorney General's request for further information regarding the changes, the State failed to meet its burden under section 5. Accordingly, on June 16, 1989 the Attorney General notified the State that he objected to the addition of the forty-eight judgeships and the redistricting of two circuits with respect to which he had earlier requested information. *See* Appendix B.

The statutes to which the Attorney General has objected fall into three broad categories. First, two new judicial circuits are created. Second, some circuits that previously had only one superior court judgeship are given one or more additional judgeships. Third, certain circuits that had previously had more than one superior court judgeship are given one or more additional judgeships.

In 1989 the State General Assembly created six more superior court judgeships. All but one of these was to commence on July 1, 1989. *See* Appendix C. The governor has agreed to refrain from nominating anyone to fill these posts pending this court's decision. The remaining judgeship is authorized to commence on January 1, 1990. The State has not yet submitted these changes to the Attorney General for preclearance, nor has the State commenced a declaratory judgement action in the District Court for the District of Columbia as provided by section 5 of the Voting Rights Act.

One of the judgeships created in 1989 has, however, been precleared: the officials of Bartow County submitted

the addition of a judgeship to the Cherokee Circuit to the Attorney General for preclearance, and the Attorney General has notified Bartow County that he does not object to the change.

Among other requirements for election, a candidate for a superior court judgeship must designate the specific opening for which he is seeking election if there is more than one judgeship up for election. In order to be elected, a candidate must receive an absolute majority of votes cast. Judges are elected on a circuit-wide basis. As we discuss below, for the purposes of our opinion we will treat these three requirements as having been precleared within the context of the then-existing electoral scheme. *See* infra Part III.A.2.

II.

The role of the three-judge court entertaining an action under section 5 of the Voting Rights Act is limited. The three-judge court determines "(1) whether a change [is] covered by § 5, (ii) if the change [is] covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy [is] appropriate." *City of Lockhart v. United States*, 460 U.S. 125, 129, 103 S.Ct. 998, 1001 n.3, 74 L.E.2d 863 (1983). The court does not consider the merits of a plaintiff's claim that the proposed changes are discriminatory. *United States v. Board of Supervisors*, 429 U.S. 642, 97 S.Ct. 833, 51 L.E.2d 106 (1977); *Perkins v. Matthews*, 400 U.S. 379, 385, 91 S.Ct. 431, 27 L.E.2d 476 (1971). The court may consider any equitable arguments put forth by the defendants or the

plaintiffs only in the limited context of fashioning an appropriate remedy. *See infra* Parts IV and V.

III.

As noted above, the first step for a three-judge court is to determine "whether a change [is] covered by § 5." In this case, that question has two facets. First, whether, as a general matter, section 5 encompasses changes regarding the election of judges. If section 5 applies to the election of judges, then the next step is to determine whether the specific "changes" at issue in this case are "covered changes," i.e., changes that trigger the application of section 5.[6]

A.

"For possible appeal purposes," the State has "expressly reserve[d] the contention that the election of judges are never covered by Section 5." Because defendants cannot cede jurisdiction to a federal court, and because three-judge district courts are exceptional, this court should consider its jurisdiction as a threshold issue. *Cf. Harper v. Levi*, 520 F.2d 53 (D.C.Cir. 1975) (statute calling for three-judge district court should be strictly construed).

Courts that have addressed this question have concluded that section 5 applies to the election of judges. *See Haith v. Martin*, 618 F. Supp. 410 (E.D.N.C. 1985) (three-judge court), *aff'd mem.*, 477 U.S. 901 (1986); *Kirksey v. Allain*, 635 F. Supp. 347 (S.D. Miss. 1986) (same).[7]

The Supreme Court's summary affirmance of *Haith v. Martin* may well have decided this issue. In *Haith*, the state did not challenge that the changes were changes of a "standard, practice, or procedure with respect to voting," but the state did argue that section 5 did not apply to the election of judges. 618 F.Supp. at 414. The state also argued that equitable principles excused the state's failure to preclear because earlier the state had submitted the changes for preclearance and the Justice Department had informed the state that the changes at issue were not within the scope of section 5. *Id.*

The three-judge court concluded that section 5 encompassed the election of judges, and found that the proposed changes to the election of superior court judges had not been precleared as section 5 required. *Id.* at 412-13. The court also concluded that section 5 did not empower the court "to provide equitable relief to defendants, no matter how just their cause." *Id.* at 414.

The state appealed to the Supreme Court. The state's jurisdictional statement presented the following two questions to the Court:

I. Whether this Court's decision in *Allen v. State Board Elections*, 393 U.S. 544 (1969), should be extended to cover a state's judiciary?

II. Whether past changes in North Carolina's judiciary must be precleared pursuant to § 5 of the Voting Rights Act, in light of the special circumstances of this case?

The Supreme Court summarily affirmed the three-judge court. 477 U.S. 901 (1986).

The State cites *Fusari v. Steinberg*, 419 U.S. 379, 388-89, n.15, 95 S.Ct. 533, 42 L.E.2d 521 (1975) for the proposition that a summary affirmance is of limited precedential significance. All *Fusari* teaches, however, is that lower courts may not construe a summary affirmance as having reached any issues other than those absolutely necessary to have resolved the case. As plaintiffs observe, summary affirmances "without doubt reject the specific challenge presented in the statement of jurisdiction" and "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238, 53 L.E.2d 199 (1977).

For the *Haith* Court to have affirmed, it necessarily must have concluded that section 5 applies to the election of judges.[8]

Even in the absence of the Supreme Court's affirmance in *Haith*, the State has been unable to point to any language in the statute or in the legislative history in support of its contention that section 5 of the Voting Rights Act does not apply to the election of judges.

By its terms, section 5 of the Voting Rights Act does not differentiate among types of elections. Section 5 applies to "*any* voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." The Supreme Court has ruled that the broadest possible meaning should be given to the phrase "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." *Allen v.*

State Board of Elections, 393 U.S. 544, 89 S.Ct. 817, 22 L.E.2d 1 (1969). As the *Allen* Court noted, "[t]he legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered state in even a minor way." *Id.* at 566. *See also Dougherty County, Georgia, Board of Education v. White*, 439 U.S. 32, 99 S.Ct. 368, 58 L.E.2d 269 (1978); *United States v. Sheffield Board of Commissioners*, 435 U.S. 110, 122-23, 98 S.Ct 965, 55 L.E.2d 148 (1978).

Although not dispositive on the issue of the intent of Congress in passing the 1964 Voting Rights Act, it is interesting to note that when Congress considered extending the Voting Rights Act in 1982, Congress apparently believed the Voting Rights Act applied to the election of judges. For example, Senator Hatch asserted that the Act's use of the term " 'political subdivision' encompasses all governmental units, including city and county councils, school boards, *judicial districts*, utility districts, as well as state legislatures." S.Rep. 417 at 151, 1982 U.S.Code Cong. & Admin. News 323 (emphasis added). In addition, the statistical evidence presented to Congress in considering the need to extend the Voting Rights Act uniformly included election of minorities to judgeships (where appropriate).

Thus, in light of the Supreme Court's summary affirmance of *Haith*, and in light of the broad language of section 5, we conclude that section 5 applies to the election of judges.

B.

Having concluded that the election of judges falls within the scope of section 5, our next task is to determine 'whether the specific changes at issue here trigger section 5 scrutiny, i.e., whether the statutes at issue here enact changes of "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting."

1. The creation of new circuits.

The defendants do not dispute that the creation of new judicial circuits falls under section 5; yet even while acknowledging this, the State thus far has refused to take the necessary steps to preclear the redistricting changes. Indeed, the changing of geographical boundaries of election districts, either by redrawing or splitting pre-existing districts, however minor, is unquestionably a change that must be precleared under section 5. *See* 28 C.F.R. § 51.13(e) (Example of covered change includes "Any change in the constituency of an official or the boundaries of a voting unit (e.g., through redistricting, annexation, deannexation, incorporation, reapportionment, changing to at-large elections from district elections, or changing to district elections from at-large elections)"). *See also, e.g., McCain v. Lybrand*, 465 U.S. 237, 104 S.Ct. 1037, 79 L.E.2d 271 (1984) (creation of residency districts within county falls under section 5); *Georgia v. United States*, 411 U.S. 526, 93 S.Ct. 1702 (1973) (redistricting); *Allen v. State Board of Education*, 393 U.S. 544, 89 S.Ct. 817 (1969) (change from district to at large voting); *McMillan v. Escambia County*,

559 F. Supp. 720 (N.D.Fla.) (redistricting), *cert. denied.* 464 U.S. 830, 104 S.Ct. 108, 78 L.E. 110 (1983).

The redistricting necessarily affects both the newly-created circuits and the prior circuits from which new circuits were created. Thus, the creation of the Houston Circuit from the former Macon Circuit, and the creation of the Alcovy Circuit from the Western and Stone Mountain Circuits implicates both the newly-created circuits and the current Macon, Western, and Stone Mountain circuits. Any judgeships that were added to any of these circuits after the redistricting are, therefore, also subject to preclearance. Specifically, the following acts all require preclearance under section 5:

Year	*Act*	*Change*
1969	303 (as amended 1971 Act 587)	created Houston Circuit
1972	849	created Alcovy Circuit
1972	1194	Stone Mountain add'l judge
1976	996	Western add'l judge
1978	1082	Alcovy add'l judge
1981	772	Macon add'l judge
1984	851	Houston add'l judge
1986	1339	Stone Mountain add'l judge

2. The Creation of New Judgeships

In determining whether the addition of a new judgeship to an existing circuit is a covered change in a "standard, practice, or procedure with respect to voting," we recognize that "[t]he legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered state in even a minor way." *Allen v. State Board of*

Elections, 393 U.S. 544, 566, 89 S.Ct. 817, 832 (1969). *See also Dougherty County, Georgia, Board of Education v. White*, 439 U.S. 32, 99 S.Ct. 368 (1978); *United States v. Sheffield Board of Commissioners*, 435 U.S. 110, 112-23, 98 S.Ct. 965, 974-75 (1978).

The regulations under section 5, promulgated by the Attorney General, stress the broad scope of "standard, practice, or procedure:[9]

> 28 C.F.R. § 51.12 Scope of requirement.
>
> Any change affecting voting, even though it appears to be minor or indirect, returns to a prior practice or procedure, ostensibly expands voting rights, or is designed to remove the elements that caused objection by the Attorney General to a prior submitted change, must meet the Section 5 preclearance requirement.

The Supreme Court has approved expressly of this expansive view of § 5: "Given the central role of the Attorney General in formulating and implementing § 5, this interpretation of its scope is entitled to particular deference."[10] *Dougherty County, Georgia, Board of Education v. White*, 439 U.S. at 39, 99 S.Ct. at 373. *See also United States v. Board of Commissioners*, 435 U.S. 110, 98 S.Ct. 965 (1978) (giving deference to Attorney General's contemporaneous interpretation as guide to congressional intent).

In addition to its express approval of the Attorney General's broad view of section 5, the Supreme Court has set the following standard for whether a proposed change falls within § 5: "in determining if an enactment triggers § 5 scrutiny, the question is not whether the provision is in fact innocuous and likely to be approved, but whether it has a *potential* for discrimination." *Dougherty County,*

Georgia, Board of Education v. White, 439 U.S. at 42, 99 S.Ct. at 374 (emphasis in original).

Thus, to determine whether the addition of a judgeship to a preexisting circuit is a covered change we must consider whether that addition has a potential for discrimination, and must conduct our inquiry in light of the Supreme Court's admonition that "Congress intended to reach any state enactment which altered the election law of a covered state in even a minor way." We stress, however, that we may not consider the merits of whether or not a particular change has a discriminatory purpose or effect; rather, we may only consider whether it has a *potential* for discrimination.

The State argues that the addition of new judgeships does not constitute a covered change, and that it has no potential for discrimination, as the new judges will be elected according to Georgia's majority-vote, designated post, and circuit-wide voting election procedures, all of which have already been precleared.[11] According to the State, the creation of additional judicial posts does not change any "standard, practice, or procedure with respect to voting" where the method by which candidates will be elected to those posts has not been changed.

The State's argument, however, assumes that Georgia's election procedures were precleared with respect to the judgeships existing at the time of preclearance *and with respect to any future judgeships*. We cannot accept such an assumption. It is well established that the Attorney General does not preclear a change unless it is expressly and unambiguously presented to him for preclearance. *McCain v. Lybrand*, 465 U.S. 253, 104 S.Ct. 1037 (1986).

Preclearance occurs only in the context of an existing electoral scheme; the number of judges elected within a particular circuit constitutes part of that scheme. If adding new judicial posts, even where candidates will be elected according to precleared voting procedures, has "a potential for discrimination," then such an addition would be a covered "enactment" under section 5. *Dougherty County*, 439 U.S. at 42, 99 S.Ct. at 374.

Furthermore, the Attorney General could not have *objected* to the State's proposed election procedures based on the possibility that such procedures could have a discriminatory effect *if* additional judgeships were subsequently added. The Attorney General may only preclear that which is presented to him, and preclearance of the election procedures as applied to election of a certain number of judges does not insulate those procedures from preclearance review when they are applied to a different number of judges and *may*, therefore, have a discriminatory effect.[12]

We think that, given Georgia's majority-vote, designated-post, and circuit-wide election rules, the creation of new judgeships does have the potential for discrimination. Where more than one judicial post exists in a given circuit, these election rules require a candidate to run for a specific seat. Georgia law thus precludes the alternative system where all candidates compete against each other and where judgeships are awarded to the highest vote-getters out of the field of candidates.

One effect of precluding the latter form of election is to prevent effective "single-shot" voting. In a "single-shot" voting campaign, a cohesive bloc of minority voters

agrees to vote for only one candidate out of a group of candidates running for office, even though two or more officeholders will be elected out of the group of candidates running. For example, if two judges are to be elected out of a field of four candidates, the minority bloc of voters will vote for just one candidate. By focusing their voting power in this way, minority group can sometimes elect someone to office without a significant amount of support from the majority group voters.[13] Majority-vote, designated-post, and circuit-wide election rules are often called "anti-single-shot" provisions because they render such "single-shot" campaigns futile.

Anti-single-shot provisions cut off one avenue by which minority voters can exercise the vote within the electoral system. Changes which mitigate the ability of minority groups to elect their choice of candidates are potentially discriminatory. Adding judges to a circuit can bring about just such a change, because the anti-single-shot provisions can affect adversely the voting rights of minorities depending upon the number of judicial posts available.

The potential for discrimination resulting from the interplay of anti-single-shot provisions and a change in the number of posts is most evident in the change from a single-judge to a multi-judge circuit. Twenty-four of the challenged acts implement such a change. Where only one judge is to be elected in a circuit, anti-single-shot provisions can have no potential for discrimination. If another judicial post is added, however, such provisions may well be thwarting what would otherwise be an opportunity to conduct a successful single-shot voting campaign.[14]

Adding a post to a multi-judge circuit could have the same effect. Depending upon the percentage of minority voters and the cohesiveness of their voting, a successful single-shot voting campaign may be highly improbable until there are three or more available posts in the circuit.[15] If a single-shot campaign, although unavailing when only two posts are available, would be successful in a three-post race, then the addition of that third post alters the effect of the anti-single-shot provisions in that district. As stated above, because anti-single-shot provisions affect minority bloc voting power, any potential change in the impact of such provisions creates the potential for discrimination. Thus, adding a judge or judges for either single-judge or multi-judge districts, has the potential for discrimination against the backdrop of anti-single-shot-election law provisions such as Georgia's.

Section 5 is a drastic remedy imposed on the States to remedy extraordinary wrongs. The State suggests that our ruling here will drastically expand the impact of Section 5. We disagree. The simple reality of Section 5 is that if a covered jurisdiction seeks to enact any change with respect to voting, however minor, that change must be precleared. If the Attorney General, or the District Court for the District of Columbia, refuses to preclear the change, then that change may not be enforced.

Contrary to the State's suggestion, our ruling here does not imply that if a State seeks to preclear any minor change, then the Attorney General may try to recast a state's entire electoral system. If a change is not precleared then the State retains the option of returning to the *status quo ante*. We recognize that this is harsh result, but it is mandated by federal law.[16]

IV.

It is undisputed that the defendants have not satisfied the requirements of Section 5. The defendants have not sought a declaratory judgment in the District of Columbia. Not only have they failed to preclear the changes with the Attorney General, but the Attorney General has notified the parties that he objects to the proposed changes in accordance with published regulations.[17]

The State has suggested that it is waiting to complete the section 2 case before it complies with the Attorney General's request for information. The defendants of course have that right, but that does not mean that the Attorney General must stop his consideration of the changes. As the Supreme Court has noted, the very purpose of section 5 is to require preclearance before changes can be put into effect, and to avoid using litigation by voters as the mechanism for testing changes in voting laws. *See e.g., McCain v. Lybrand*, 465 U.S. 236, 243-44, 104 S.Ct. 1037, 1042-43 (1984). If this court were to adopt the defendants' theory, and excuse their failure to comply with the Attorney General's request for more information, it would undercut the core of section 5. The State's unilateral decision not to comply with the requirements of preclearance does not stay the operation of section 5.

We are mindful of the time that has elapsed since some of the changes were enacted. We cannot, however, "equitably preclear" any of the changes based on equity's rule of laches. *See McCain*, 465 U.S. at ___, 104 S.Ct. at 1046-47; *cf. Haith v. Martin*, 618 F. Supp. 410 (estoppel). Recognizing that the Attorney General could not keep

track of changes relating to voting being made, Congress put the burden on the covered jurisdictions to seek preclearance to avoid the very problem we now face. We would do violence to the heart of section 5 if we were to excuse the State's failure to seek preclearance merely because the State has been disregarding section 5 for a long time. Moreover, Supreme Court precedent in this area is unambiguous. *Allen v. State Board of Elections*, 393 U.S. 544, 571, 89 S.Ct. 817, 834; *United States v. Sheffield Board of Commissioners*, 435 U.S. at 136, 98 S.Ct. at 981; *McCain v. Lybrand*. 465 U.S. at 249-51, 104 S.Ct. at 1045-46. Section 5 means what it says: absent preclearance, a covered change may not be enforced.

V.

The final step for the three-judge court is to determine "what remedy is appropriate." Section 5 contemplates injunctive relief, which is by its nature equitable. Moreover, the Supreme Court has indicated that the three-judge court has some limited discretion in fashioning a remedy by directing that the court must fashion an "appropriate" remedy. *See e.g., Perkins v. Matthews.*, 400 U.S. 379, 441, 91 S.Ct. 431, 441 (1971) (question of appropriate remedy for district court); *cf., N.A.A.C.P. v. Hampton County Election Comm'n*, 470 U.S. 166, 183, 105 S.Ct. 1128, 1138, 84 L.E.2d 124 (1985) (discretion of district court). Thus, we must exercise our discretion in fashioning the appropriate remedy for the case at hand.

As we discussed above, a three-judge court cannot rule that the covered changes have been "equitably precleared." At the other extreme, we are not required to

rule, as the plaintiffs suggest, that the covered changes are void *ab initio*, retroactively rendering void any actions taken by a judge whose position is the result of a covered change that was not precleared. Granting such a remedy would result in the reversal of years of convictions, the overturning of myriad judgments; in short, it would create genuine chaos. The plaintiffs were irresponsible to suggest that this court follow such a course. We cannot stress too strongly that the validity of the actions taken by these judges is in no way implicated by our decision here.

The language of the statute – "*may* not be enforced" – suggests prospective relief. Moreover, in *Berry v. Doles*, 438 U.S. 192, 98 S.Ct. 2692, 57 L.Ed.2d 693 (1978), and *N.A.A.C.P. v Hampton County Election Commission*, 470 U.S. 179, 105 S.Ct. 1128 (1985), the Supreme Court directed that appropriate relief under section 5 should include an order allowing 30 days for the state to submit the covered changes to the Attorney General for approval. *N.A.A.C.P. v. Hampton County*, 470 U.S. at 182, 105 S.Ct. at 1137; *Berry*, 438 U.S. at 192-93, 98 S.Ct. at 2693-94. Both these cases, however, involved situations where the covered changes had not been submitted to the Attorney General at all, and thus the Attorney General had not objected. Here, on the other hand, except for the five 1989 judgeships (not counting Bartow County) that were not submitted by Georgia for preclearance, the Attorney General has objected to the changes. Nevertheless, the Attorney General has expressed that he is "ready and willing to reconsider" his determination, and we will take him at his word.[18] Thus, we believe it is appropriate for us to

follow the course set out in *Berry* and *N.A.A.C.P. v. Hampton County*.

The defendants, therefore, have thirty days in which to comply fully with the Attorney General's prior request for information and to request reconsideration from the Attorney General of his objection to the proposed changes. *See generally* 28 C.F.R. § 51.45. The defendants, however, will not be allowed to use the preclearance procedure in any dilatory manner at this late stage. Under the dictates of *Berry* and *N.A.A.C.P. v. Hampton County*, defendants have 30 days in which to *complete* their submission to the Attorney General, and they may of course request expedited consideration under 28 C.F.R. § 51.34. The defendants may not comply piecemeal and seek to stretch out the preclearance process.

In *N.A.A.C.P. v. Hampton County* the Court directed that

> [i]f appellees fail to seek this approval [from the Attorney General], or if the approval is not forthcoming, the results of the [] election should be set aside. If, however, the Attorney General determines that the changes had no discriminatory purpose or effect, the District Court should determine, in the exercise of its equitable discretion, whether the results of the election may stand.

470 U.S. at 182-83, 105 S.Ct. at 1137-38.

We turn now to the appropriate remedy on the one hand, if the defendants fail to seek reconsideration from the Attorney General or if the Attorney General objects to a covered change, or on the other hand, if the Attorney General concludes that a covered change does not have a

discriminatory purpose or effect. We first will consider the latter alternative.

If, on reconsideration, the Attorney General concludes that a given change does not have a discriminatory purpose or effect, then we believe, in the exercise of our equitable discretion, that an election under that change should be allowed to stand. In so concluding, we note that until 1986, the date of the Supreme Court's summary affirmance of *Haith v. Martin*, it was not unequivocally clear that section 5 applied to the election of judges. *See Perkins v. Matthews*, 400 U.S. 394, 396, 91 S.Ct. 431, 441 (1971) ("in determining the appropriate remedy, other factors may be relevant, such as the nature of the changes complained of, and whether it was reasonably clear at the time of the election that the changes were covered by § 5"). We also recognize the upheaval in the State judiciary that would result if we were to set aside the elections of a significant number of Superior Court judges. We are not unmindful of the fact that the State itself is responsible for the consequences of its failure to comply with the provisions of section 5, yet we believe that the potential harm to the people of the State of Georgia outweighs the potential harm (if any) of allowing the elections to stand. Thus, if the Attorney General finds that a change does not have a discriminatory purpose or effect, then the election under that change (i.e., that particular additional judgeship) shall stand. Similarly, if the Attorney General concludes that the changes enacted in 1989 do not have a discriminatory purpose or effect, then the Governor may fill those positions.

We turn now to the more problematic issues. Should the defendants fail to seek reconsideration from the

Attorney General within the 30 days permitted, or should the Attorney General decline to reconsider his prior objection, or should he, upon reconsideration, conclude that a particular change has a discriminatory purpose or effect, then we must afford some affirmative relief. *N.A.A.C.P. v. Hampton County* suggests, "the election should be set aside," *N.A.A.C.P. v. Hampton County*, 470 U.S. at 183, 105 S.Ct. at 1137-38, but this is not our only remedy. *Cf. Perkins v. Matthews*, 400 U.S. at 395, 91 S.Ct. at 440 (declining to set aside election).

We have no difficulty holding that the Governor may not appoint judges to any non-pre-cleared position created in 1989 until that position has been precleared. Further, we hold that in the case of a judgeship added to a pre-existing circuit, no further election can be held for that position if the position is not precleared. However, we believe it a proper exercise of our equitable discretion to permit incumbents to serve out their full terms, and do not declare unprecleared judgeships added to circuits with unchanged boundaries void until the date of the next scheduled election for the position.

Allen v. State Board of Elections, 393 U.S. 569, 89 S.Ct. 817 (1968) is instructive. In *Allen* the Court refused to set aside the elections at issue because, "[t]hese § 5 coverage questions involve complex issues of first impression – issues subject to rational disagreement. The state enactments were not so clearly subject to section 5 that the [state's] failure to submit them for approval constituted deliberate defiance of the [Voting Rights] Act." 393 U.S. at 572, 89 S.Ct. at 835. As noted above, *see* supra Part III.A, the applicability of section 5 to the election of judges has, until recently, been a "subject of rational disagreement."

Thus, *Allen* suggests that it is within our discretion in fashioning the appropriate remedy to permit an incumbent to serve out a term of office.

If we were to set aside numerous judgeships abruptly, the remaining judges would be overwhelmed by the resulting increase in work and the court system thrown into disarray. This would be harmful to all citizens of the State, including minorities. On the other hand, permitting these judges to serve out their term will not significantly injure the plaintiffs.

Thus, if the defendants fail to obtain approval of a change that adds a judgeship to a preexisting circuit we believe it best to allow the incumbent to serve out his term of office. If the Attorney General concludes that any of the judgeships created in 1989 has the purpose or effect of discrimination, then that post may not be filled, either by appointment or election.

We turn finally to the circuits that have been redistricted. If, upon resubmission and reconsideration, the Attorney General continues to object to the redistricting, then we have no choice but to enforce the prior districting plan. As discussed earlier, *all* judgeships in these redistricted circuits are implicated by the State's failure to preclear the changes. Thus, again weighing the equities, we believe that the appropriate remedy in the event the defendants do not obtain preclearance is to direct that at the next regularly scheduled election the affected circuits shall revert to the prior districting plan and the previous number of judgeships, with the additional judgeships then terminating, even if, under the staggered term system, there remains time in the elected terms.

VI.

We are fully aware of the gravity of our decision here. We also are constrained to note that we have come to these conclusions reluctantly. Nevertheless, the State has pointed to no authority to suggest that section 5 does not apply to the election of judges, nor has the State been able to show that the addition of judges is not a covered change within the scope of section 5. By the same token, the State has failed to adduce any precedent that might justify its deliberate decision not to comply with the Attorney General's request for information, a decision that has forced us ineluctably to take the steps we have here.

Accordingly, following the explicit language of section 5 of the Voting Rights Act and Supreme Court precedent, we conclude that section 5 applies to the election of judges. We also conclude that the specific changes at issue here are covered changes that must trigger section 5 scrutiny. We further find that these covered changes have not been precleared as section 5 requires. Therefore, as detailed above, because these changes have not been precleared, Congress has directed they "may not be enforced."

SO ORDERED.

B.A.E.
12-1-89

APPENDIX A

Year	Act		Judicial Circuits
1967	93		Clayton
1967	99		Blue Ridge
1968	768	(Amending 1967 Act 93)	Clayton
1967	175	Northeastern	
1971	28		Tallapoosa
1972	852		Rome
1972	1091		Gwinnett
1972	1557		Cobb
1974	859		Conasauga
1977	237		Clayton
1977	291		Tallapoosa
1977	353		Gwinnett
1978	1007		Lookout Mountain
1978	1013		Cherokee
1978	1016		Cobb
1980	944		Tallapoosa
1980	944		Douglas
1980	1016		Rome
1981	119		Mountain
1981	122		Conasauga
1981	524		Douglas
1982	862		Cobb
1982	863		Gwinnett
1982	865		Rockdale
1983	364		Appalachian
1984	827		Cobb
1984	850		Clayton
1986	933		Northeastern
1986	934		Piedmont
1987	495		Gwinnett
1987	547		Cobb
1988	915		Appalachian

APPENDIX B

Changes to which the Attorney General has Objected

Year	Act		Judicial Circuits
1967	100		Stone Mountain
1967	101		Brunswick
1968	746		Ocmulgee
1969	183		Southern
1969	303	(amended 1971 Act 587)	Houston
1969	616		Chattahoochie
1971	457		Augusta
1971	802		Atlanta
1971	810		Atlantic
1972	849		Alcovy
1972	1194		Stone Mountain
1974	849		Coweta
1974	850		Atlanta
1974	857		Waycross
1974	858		Dougherty
1975	115		Southern
1975	503		Flint
1976	996		Western
1976	1108		Oconee
1977	244		Middle
1977	247		Northern
1977	293		Griffin
1977	336		Chattahoochie
1977	340		Alapaha
1978	1017		South Georgia
1978	1076		Ogeechee
1978	1082		Alcovy
1979	479		Ocmulgee
1979	515		Eastern
1980	725		Dublin
1980	978		Tifton
1980	1078		Brunswick
1980	1209		Cordele
1980	1350		Coweta

1981	101	Southwestern
1981	107	Waycross
1981	123	Toombs
1981	124	Pataula
1981	772	Macon
1982	860	Atlantic
1984	845	Atlanta
1984	851	Houston
1986	1336	Augusta
1986	1339	Stone Mountain
1987	315	Griffin
1987	743	Brunswick
1988	911	Stone Mountain

APPENDIX C

Non-Precleared Judgeships Created in 1989

Act	Circuit
S.B. 142	Southern Judicial Circuit
H.B. 559	Chattahoochee Judicial Circuit
H.B. 306	Eastern Judicial Circuit
S.B. 167	Atlantic Judicial Circuit
H.B. 721	Atlanta Judicial Circuit

Notes

1. These plaintiffs include: Representatives from Fulton County to the Georgia General Assembly; residents and voters of Fulton County; residents and voters of Glynn County, Georgia; a resident and voter of Muscogee County, Georgia; a resident and voter of Mitchell County, Georgia; a resident, voter, and Representative to the Georgia General Assembly of Dougherty County, Georgia; a resident and voter of Bibb County, Georgia; a

resident, voter, and elected official of Chatham County, Georgia; and a resident and voter of Wilkes County, Georgia. All plaintiffs are black.

2. Oral argument, Tr. at 5.

3. Other named defendants, having been found unnecessary to provide full relief, were dismissed pursuant to Fed. R. Civ. P. 21.

4. Section 1973c provides in relevant part:

> § 1973c. Alteration of voting qualifications and procedures; action by state or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three judge district court; appeal to Supreme Court
>
> Whenever a [covered] State or political subdivision [. . .] shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, [. . .] such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or

> procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

5. The information requested by the Justice Department included: the legislative history of the statutes, alternatives considered, and newspaper accounts of the superior court system; criteria used in deciding when to create new circuits rather than adding judgeships to existing circuits; description of participation by the black community in the decision-making process; state reports or

studies, from 1964 to date, relating to judicial reform, elections, additions, or redistricting; election returns since 1964 identified by race and incumbency, and also data relating to quantity and racial designation of registered voters.

6. Implicit in this is, of course, the recognition that some changes are not covered changes. For example, if a state merely codifies its election laws, this is a change, but it is not a *covered* change because it does not alter a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." *E.g., Kirksey v. Allain*, 635 F.Supp. 347, 350 (S.D.Miss. 1986) (three-judge court).

7. We also note that § 2 of the Voting Rights Act has been held to apply to the election of judges. *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988); *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir.), cert. denied, 109 S.Ct. 390 (1988); *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988).

8. The *Haith* court said that "Defendants have not challenged plaintiff's contentions that each of the statutes in question deals with a 'standard, practice, or procedure with respect to voting,' " 618 F.Supp. at 410. This does not mean that the defendants conceded that § 5 applies to the election of judges. Indeed, to the contrary, one of the issues on appeal to the Supreme Court was squarely presented as whether § 5 applies to the election of judges. What the *Haith* court's observation means is that the defendants did not challenge whether the changes were specifically "covered changes."

9. *See also* 28 C.F.R. § 51.13 (Examples of changes.)

Changes affecting voting include, but are not limited to, the following examples:

(a) Any change in qualifications or eligibility for voting.

(b) Any change concerning registration, balloting and the counting of votes and any change concerning publicity for or assistance in registration or voting.

(c) Any change with respect to the use of a language other than English in any aspect of the electoral process.

(d) Any change in the boundaries of voting precincts or in the location of polling places.

(e) Any change in the constituency of an official or the boundaries of a voting unit (e.g., through redistricting, annexation, deannexation, incorporation, reapportionment, changing to at-large elections from district elections, or changing to district elections from at-large elections).

(f) Any change in the method of determining the outcome of an election (e.g., by requiring a majority vote for election or the use of a designated post or place system).

(g) Any change affecting the eligibility of persons to become or remain candidates, to obtain a position on the ballot in primary or general elections, or to become or remain holders of elective offices.

(h) Any change in the eligibility and qualification procedures for independent candidates.

(i) Any change in the term of an elective office or an elected official or in the offices that are elective (e.g., by shortening the term of an office, changing from election to appointment or staggering the terms of offices).

(j) Any change effecting the necessity of or methods for offering issues and propositions for approval by referendum.

(k) Any change affecting the right or ability of persons to participate in political campaigns which is effected by a jurisdiction subject to the requirement of Section 5.

10. The Attorney General has filed an amicus brief in this case on behalf of plaintiffs, in which he expresses his belief that the addition of judgeships to pre-existing circuits is a "covered change" under section 5

11. The State is correct in its assertion that the designated-post, majority-vote, and circuit-wide election procedures were precleared in the context of the then existing electoral scheme. In *United States v. Georgia*, C.A. No. C76-1531A (N.D. Ga. 1977)(three judge court), *aff'a mem.*, 436 U.S. 941 (1978), the court concluded that the majority vote and designated-seat election requirements had been precleared. In 1968 the Attorney General precleared the change (involving an amendment to the state constitution), whereby Georgia went from state-wide to circuit-wide election of judges. Finally, in 1983, the Attorney General precleared the change from partisan to nonpartisan election of judges.

12. In *McCain v. Lybrand*, 465 U.S. 253, 104 S.Ct. 1037 (1986), South Carolina had enacted a change in the county governance of Edgefield County. Under the 1966 act, "a three-member county Council with broad legislative and administrative powers was created, and the county was divided into three residency districts for purposes of electing Council members." 465 U.S. at 239-40, 104 S.Ct.

at 1040-41. This change was never submitted to the Attorney General for preclearance. In 1971 the state changed the number of councilmen from three to five, which necessitated the redistricting of the County into five residency districts. This change was submitted to the Attorney General for preclearance, and the Attorney General did not object to the change. Subsequently, an action was brought under section 5 alleging that the 1966 change had never been submitted to the Attorney General for preclearance.

The Supreme Court reversed the three-judge court, and held that the preclearance of the 1971 change from three councilmen to five and the attendant redistricting did not have the effect of preclearing the 1966 change that instituted the County Council. *McCain v. Lybrand*, 465 U.S. at 249-50, 104 S.Ct. at 1045-46.

Thus, under the rule of *McCain*, the Attorney General could not have precleared the addition of a judgeship to a circuit – if that is itself a covered change – when he precleared the majority-vote and designated-post requirements.

13. Assume a district with 40 minority-group voters and 60 majority-group voters where there is racial bloc voting and two seats available. If anti-single-shot provisions are in place, so that head-to-head campaigns are required, the minority group will never elect a candidate on its own without obtaining at least some majority-group votes.

However, where there are two seats available, the absence of anti-single-shot provisions may enable the minority group to elect a candidate. For example, under a scheme where voters may vote for any two from a field of

four candidates, where minority voters can engage in single-shot voting, and where the highest two vote-getters win, the election results in our hypothetical district could be as follows:

minority candidate:	40 votes
non-minority candidate #1:	50 votes
non-minority candidate #2:	35 votes
non-minority candidate #3:	35 votes

In this situation, one minority candidate and one non-minority candidate would win, the minority voters all having voted for the minority candidate and having refused to cast any votes for majority candidates.

Although the non-minority vote need not necessarily so split, nonetheless under anti-single-shot provisions such a result would never obtain under polarized voting.

14. See *supra* note 12.

15. For example, in a district with a 30 per cent minority voting bloc, where there are only two posts, even in the absence of anti-single-shot provisions and even if the majority splits its vote with 35 per cent going to each position, the majority will defeat any minority choice which, assuming racial bloc voting, would have 30 percent of the vote at most. When a third post is added, however, the anti-single-shot provision *does* make a difference because in its absence minority voters could elect a candidate by concentrating all its vote on one candidate.

16. The cannonade of the dissent is more deafening than persuasive, as the straw opinion it attacks simply is not the majority opinion. The majority had to determine whether the enactments in question have a *potential* for

discrimination. We do not – indeed we cannot – decide whether these enactments are in fact discriminatory. *If* minority voters vote as a bloc, then the addition of judges can have a discriminatory effect. The dissent does not refute that assertion. Instead, it refuses to "assume that blacks or whites will always vote in racially polarized bloc patterns." So do we. We merely note that they *may* vote in such a pattern, and if so, then the addition of judges may have a discriminatory effect. We do not conclude that such a voting pattern will occur, and we certainly do not hope for such a result. We may not, however, assume that such polarized voting will *not* occur.

It may be that the Attorney General, in reviewing the evidence of prior voting patterns (evidence the Attorney General requested and that Georgia refused to provide), will determine that the potential discriminatory effect of these changes will not be realized. That determination is for the Attorney General, not this court.

Ironically the dissent takes us to task for "supplanting the will and wisdom of the elected Legislature of Georgia . . . " when it would have us disobey the "will and wisdom" of the "elected legislature" of the United States embodied in the Voting Rights Act. That we cannot do. We share the concern expressed by the dissent over the potentially troubling effects of our decision upon the state judiciary. However, after careful study of the Voting Rights Act, its legislative history, and its construction by the courts, we have concluded that the result herein is mandated by the will of Congress.

The dissent emphasizes the changing attitudes of American voters reflected in the growing number of minority elected officials. Given these changes, Judge Bowen asserts that the addition of judges actually will have no discriminatory effect and that the potential for discrimination is "imaginary." His conclusion is based on his belief in how voters will cast their ballots. We, however, must heed the Supreme Court's admonition in *Dougherty County, Georgia, Board of Education v. White:* "in determining if an enactment triggers § 5 scrutiny, the question is not whether the provision is in fact innocuous and likely to be approved, but whether it has a *potential* for discrimination." 439 U.S. at 42, 99 S.Ct. at 374 (emphasis in original). The addition of judges can have such a potential, and we are not free to "imagine" otherwise.

17. C.F.R. § 51.40 Failure to complete submissions.

> If after 60 days the submitting authority has not provided further information in response to a request made pursuant to § 51.37(a), the Attorney General, absent extenuating circumstances and consistent with the burden of proof under Section 5 described in § 51.52(a) and (c), may object to the change, giving notice as specified in § 51.44.

18. *See also* 28 C.F.R. § 51.45 (procedure governing requests for reconsideration).

BOWEN, District Judge, concurring in part, dissenting in part:

With portions of the majority opinion in this case I concur; as to its treatment of the most straightforward issue, I dissent.

The majority opinion has all of the indicia of apparent validity: a balanced statement of the facts; a wealth of citations and case references; and a scholarly stylé. Nevertheless, it is incorrect on the most important point in the case. I have no quarrel with the majority opinion through and including section III(B) (1) thereof. Like it or not, where there are changes in the geography of a judicial circuit within a "covered jurisdiction", the Attorney General's preclearance is required. Indeed, the need for preclearance of the legislative enactments which change the geography of a judicial circuit has never been seriously questioned in this case. Under present law, every change in the demography of a judicial circuit requires preclearance.

Nor do I have any question in my mind that *Haith*, in its summary affirmance posture, stands for the proposition that the Voting Rights Act applies to judicial electoral procedures. However, in the laborious research which the parties and this Court have performed, there is no binding precedent that the mere increase in the number of judges in an existing, otherwise validly composed judicial circuit, is a change in a "standard, practice, or procedure with respect to voting."

The majority believes that a duplication or other multiplication of the *status quo*, by the mere addition of a judgeship, is a covered change because of a perceived

"potential for discrimination" therein. The proffered potential for discrimination is imaginary. This potential for discrimination (a) presumes the existence of factors which are not grounded in fact; and, (b) presupposes that some novel and ingenious method might be crafted to accommodate the wishes of plaintiffs and their class whenever a new judgeship is needed. While it is true that only a potential for discrimination, not a discriminatory purpose or effect, must be shown, the acceptance of the genuineness of the potential for discrimination proffered by the plaintiffs in this case requires a degree of credulity which I cannot muster, even under the liberal construction principles of the Voting Rights Act.

The majority sees a potential for discrimination in the addition of a judgeship to an existing district because the added judge must be appointed by the governor, must later run for designated post, and must be elected by a majority vote in a circuit-wide election. In other words, there is a "potential for discrimination" because the new judge will obtain and hold office in the same way as every Superior Court judge in Georgia! Also, the majority sees a potential for discrimination because, when additional judges are needed to handle the judicial business of a district, the Legislature has not crafted the boundaries of districts so as to produce a select constituency which will elect a judge through the racially polarized bloc vote of the plaintiff class. This proposition is based upon erroneous assumptions and logical fallacies.

I live in a Georgia city which elected a black mayor by majority vote in a 1981 city-wide election. Our county commission has thrice been chaired by a black man. A

black Superior Court judge runs unopposed for re-election. The man who will soon occupy the governor's office in the former capital of the Confederacy is part Negro. Yet, I am supposed to assume that whites and blacks always vote in racially polarized bloc patterns. Common sense tells me I cannot. If Georgia is ever to emerge from the indignity of federal scrutiny of electoral minutiae, it will occur by assuming the positive, not the negative. Similarly, I observe that in my experience nothing has done more to perpetuate racial polarization and promote misunderstanding between well-intended citizens than the frictions inherent in the continued selective application of the Voting Rights Act. Furthermore, I can imagine no set of facts more likely to foster racial bloc voting than the "single-shot" voting tactic to which the majority refers in Section III of their opinion (see footnote 12).

Judicial service is unique in government. Judges are human, but we are obliged to adhere to certain fictions relative to judicial service. For example, judges are fair, impartial, and serve only to do equal justice in the cases that come before them, regardless of the race, position, station in life, affiliation or connection of the parties therein. These properties in the compound of judicial service are recognized by the highest legal authority. "State judges as well as federal judges swear allegiance to the Constitution of the United States, and there is no reason to think that because of their frequent differences of opinions as to how that document should be interpreted, all are not doing their mortal best to discharge their oath of office." *Sumner v. Mata*, 449 U.S. 539, 549 (1981).

Any suggestion that the Legislature of Georgia might seriously entertain the notion of gerrymandering within one or more of its judicial circuits a precinct, wherein a person preferred by the plaintiff class might assuredly be elected, is anathematic and inimical to all Anglo-American tenets of judicial independence and impartiality. Every Negro and every Caucasian is entitled to the same fair justice from a Superior Court judge, regardless of the race of the judge or the race of the majority who may have elected that judge. Obviously, a judge cannot have a constituency in the usual sense.

A judge does not sit upon a board or commission and represents no group or district. A Superior Court judge presides alone, with county-wide jurisdiction, in the courts of the counties of his judicial circuit. In appropriate circumstances, a Superior Court judge may be detailed to serve outside the home circuit.

The county is the smallest unit or precinct which can be practically utilized in the election of Superior Court judges. Given the county-wide jurisdiction of a Superior Court judge, it would be wholly inappropriate for such a judge to be elected by any group smaller than the constituency of the county as a whole. The suggestion that the Legislature might develop some plan to provide a "safe district" to assure the election of a candidate chosen by the plaintiff class is rank speculation. There are 159 counties and 45 judicial circuits in Georgia. This case alone involves 43 added judgeships. The options open to the Legislature are limited. Confusion is the only likely result of an attempt to "gerrymander" the counties so as to assure the election of the judicial candidate of a racial group.

The majority is willing to adopt the plaintiffs' vernacular, "anti single-shot provisions." I am not. While majority-vote, designated-post, circuit-wide election rules may be called "anti single-shot" provisions by some, I am prepared only to refer to such rules as a uniform, statewide, fair and consistently applied system for the selection and maintenance of a highly qualified, dedicated judiciary. The "single-shot" voting technique described by the majority, as applied to the election of a Superior Court judge, makes my hair stand on end. Such "single-shot" tactics are unlikely to result in a judicial selection which is based upon qualifications and judicial temperament. A voting plan which is otherwise valid, but does not permit such "single-shot" tactics in the election of judges, is not thereby necessarily infected with a potential for discrimination. In this case, in each of the judicial circuits to which judgeships have been added, the legislature has done no more than increase the number of judges by a method which, admirably, conforms every Superior Court judgeship in the state to the same process. Thus, there are independent and very legitimate reasons for the continuation of the existing election procedures when a new judgeship is added to a judicial circuit.

The majority identifies the mere addition of a judgeship in an existing district as a potential for discrimination because "if another judicial post is added . . . , such provisions may well be thwarting what would otherwise be an opportunity to conduct a successful single-shot voting campaign." This logic assumes that with the creation of each additional judgeship, the Legislature can concoct some discrete voting procedure, applicable to that judicial circuit alone, which, by boundary alignment,

"single-shot" voting practices or otherwise, will advance the interests of the plaintiff class. The implicit assumption that the legislature might be willing to discard a working uniform, state-wide procedure for the selection of all Superior Court judges, and steer a new course leading to different procedures for each circuit, is preposterous. Because Superior Court judges have county-wide jurisdiction within their circuits, because they may, on occasion, be designated from one circuit to another, and because their courts are vested with general civil and criminal jurisdiction in each of the counties of the State of Georgia, the state has a palpable, genuine, independent, legitimate interest in maintaining a uniform method of selecting Superior Court judges of high caliber. This interest far outweighs any concern which the majority should have for a volubly touted "potential for discrimination" which, at best, is hypothetical and ephemeral.

In short, the majority has decided that the Legislature of Georgia has not done what it could never be expected to do in the first place. Even in a voting rights case a potential for discrimination should be more than a chimera. To provide a basis for such drastic relief, a potential for discrimination should, at the least, be genuine and reasonable. I cannot conclude that some affirmative action-based "balkanization" of judicial voting procedures across the state is a likely or appropriate prospect. The proffered potential for discrimination, therefore, is neither genuine nor reasonable.

Finally, it is unfair to describe the existing plan for electing most of the Superior Court judges of this state as containing "anti single-shot provisions." The laws which provide for the selection of Georgia's judges, many of

which have been precleared, are not "anti-anything." They are simply an extension of existing provisions which draw the highly desirable mantle of uniformity over each such position existing within the State of Georgia.

While I will not engage in what might be termed "result oriented" logic, I will express my concern for the far-reaching effect of the majority's conclusion in this case. The decision regarding changes in circuit boundaries affects relatively few counties and judges. Relief in the form of a return to the last valid plan is workable, albeit burdensome. However, the decision as to 43 added judgeships is a wholesale and unwarranted intrusion into Georgia's judicial system and the fundamentals of federalism.

In the palliative language of Section V of their opinion, the majority recognizes the chaos which would certainly result if the elections of sitting judges were invalidated. The apologia of Section VI, the relatively mild form of relief ordered, and the majority's assurances to the contrary notwithstanding, this court's decision as to judgeships added over the years will, if implemented, work much mischief, hardship and expense within the State of Georgia for years to come. Despite the majority's anticipatory comment, "the validity of the actions taken by these judges is in no way implicated by our decision here," many unhappy litigants in civil and criminal cases may raise that question anew. My imagination is not broad enough to estimate the number and the cost of the resultant habeas corpus proceedings alone. Even if unsuccessful, such cases will be filed and the state will be forced to defend them.

In this action the role of the three-judge court is indeed limited. With respect to the creation of new judgeships in existing circuits, our sole inquiry is whether the proposed change falls within Section 5. My view is that a mere change in the *number* of judges is not a change with respect to the *election* of judges. There is at issue here no standard, practice, or procedure with respect to voting different from that already precleared or in force as of November 1, 1964. There is no argument that the existing judicial circuits in which judgeships have been added are somehow otherwise infirm (see footnote 11). The mere replication of a judicial position in a circuit does not result in a covered change. If anything, the addition of a judgeship is a legislative reiteration of the *status quo*.

Congress intended the Voting Rights Act to cover judicial elections (see majority opinion Section III(A)). However, this conclusion does not end the inquiry into congressional intent. The plaintiffs' arguments, which the majority hasten to embrace, imply that Section 5 preclearance is an undertaking easily satisfied. However, as the defendants have demonstrated, preclearance is a laborious process which requires the submission of a tremendous amount of documentation. Preclearance is not accomplished by writing a simple letter. The onus on the state in compiling and organizing the information necessary to comply with the preclearance requirement is great. I cannot believe that the Congress intended to place upon "covered" states the burden of preclearing each new judgeship added to existing judicial circuits, where election procedures have already been precleared. The majority have cited no authority that such was Congress' intention in passing Section 5 of the Voting Rights

Act. The case law cited by the majority merely holds that the Voting Rights Act should be liberally construed. However, this is not authority for the plaintiffs' proposition that adding judgeships to existing judicial circuits using precleared election procedures is a change in a "standard, practice, or procedure with respect to voting."

The potentials for discrimination to which the majority anchor their reasoning is imaginary. The state's overriding independent, legitimate interest in maintaining a uniform election procedure is clearly shown. Accordingly, with respect to the issue of the addition of judgeships in existing circuits, the plaintiffs' complaint should be dismissed.

As do the majority, I have great concern about any relief to be ordered in this case. The one thing of which I am certain is that whatever the relief, it will serve to undermine the confidence of the public in the federal and state court systems and the judiciary as a whole. I agree with Judge Dubina when he said, "there is a real possibility that no fair, reasonable, and equitable remedy can ever be fashioned to redress whatever . . . violations may exist in the instant case. Any remedy may only serve to further polarize the voting blocs which currently exist, and will almost certainly result in the removal from the bench of a number of decent, fair and competent state judges with many years of dedicated service. In remedying one injustice this court may, in effect, be creating others." *Southern Christian Leadership Conf. v. Siegelman*, 714 F. Supp. 511, 521 (M.D. Ala. 1989). We embark upon a dangerous voyage. We are about to supplant the will and wisdom of the elected Legislature of Georgia with decrees that are the product of the well-intended but

inexperienced judicial mind. The Legislature has been creating judgeships for two hundred years. We have only just begun. As Justice Stevens cogently noted, "Because judges may not possess such expertise, however, I am afraid the Court is planting seeds that may produce an unexpected harvest." *Rogers v. Lodge*, 458 U.S. 613, 645 (1982) (Stevens, J., dissenting).

While I reject the proffered potential for discrimination which the majority adopts, while I cannot accept as a premise to any decision the concept that blacks or whites will always vote in racially polarized bloc patterns, and while I disagree with the majority opinion that the mere addition of judgeships constitutes a covered change requiring preclearance by the Attorney General I am also constrained to say that the relief ordered by the majority is about as ameliorative as could be hoped under the circumstances.

Accordingly, with respect to the covered changes as to which I concur with the majority, I concur in the relief ordered. With respect to the judicial circuits where the number of judgeships has only been increased, I would deny any relief to plaintiffs.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

TYRONE BROOKS, et al., Plaintiffs,	)	
vs.	)	CV 288-146
STATE BOARD OF ELECTIONS, et al.,	)	FILED MAR 26 '90
Defendants.	)	

Before KRAVITCH, Circuit Judge, EDENFIELD and BOWEN, District Judges.

ORDER

Defendant's Motion for Reconsideration of the Remedy is DENIED, without prejudice to renew the motion when the Department of Justice has completed with Section Five review or after April 23, 1990, whichever first occurs. The concerns of the defendant raised in its motion are premature as we do not yet know whether the Department of Justice will or will not preclear the challenged judgeships.[1] Moreover, we note that the December 1, 1989 order of this Court does not preclude individuals from qualifying for Superior Court judgeships in anticipation of Justice Department preclearance of the added judgeships. *Cf. Libertarian Party of Georgia v. Harris*, 644

[1] According to the state, twenty-one judgeships, objected to by the Justice Department, are scheduled for elections in 1990. In addition, five newly created judgeships have been submitted to the Justice Department for preclearance.

F.Supp. 602, 604-5 (N.D. Ga. 1986) (qualifying requirements may be satisfied during pendency of preclearance process).

SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

TYRONE BROOKS, et al., Plaintiffs,	)	Civil Action
vs.	)	No. 288-146
STATE BOARD OF ELECTIONS, et al., Defendants.	)	FILED MAY 29, '90

Before KRAVITCH, Circuit Judge, EDENFIELD, Chief District Judge, and BOWEN, District Judge.

ORDER

On April 25, 1990, the Attorney General completed his Section 5 review of the statutes being challenged in this case and declined to withdraw his objections to those statutes creating additional judgeships. The next day, defendants renewed their motion for reconsideration of the remedial portion of this Court's December 1, 1989 Order, which calls for the elimination of unprecleared judgeships at the end of the sitting incumbents' terms. Having carefully weighed and arguments of each side, we GRANT the motion.

Defendants ask that we allow judges in unprecleared seats to remain in their posts, beyond the end of their terms if necessary, until a new electoral scheme is precleared and implemented. They contend that such a modification will guarantee time to seek preclearance from the District Court for the District of Columbia without

risking the loss of sitting judges during the pendency of that litigation.

We understand the State's desire to pursue judicial preclearance, in which the parties obtain a full trial on the merits. In the case at bar, issues of statewide importance lie in the balance. While Congress provided for preclearance review by the Justice Department as an administrative alternative to the declaratory judgment action, *see Morris v. Gressette*, 432 U.S. 491, 503 (1976), it may be that the issues in this case warrant an adversarial proceeding.

By granting the requested relief, we assure that the defendants will be able to seek judicial review of the statutes without the risk of serious disruption of Georgia's judiciary.[1] The modification does not impose an undue burden upon the plaintiffs or upon the minority voters who the plaintiffs propose to represent. Therefore, we change the second full sentence on page 26 of our Order of December 1, 1989 to read as follows:

> Incumbents whose terms end in 1990 may continue to serve in unprecleared judgeships until one of the following events occurs:

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[1] As plaintiffs accurately note, defendants could have filed a declaratory judgment action at any time after the statutes creating the new judgeships were passed; the oldest of the statutes was passed in 1967. However, before the issuance of our December 1, 1989 Order, the question of whether the new judgeships were covered by Section 5 was in dispute. We assume that defendants will now expeditiously pursue judicial preclearance.

a) our December 1, 1989 Order requiring preclearance is reversed by the United States Supreme Court;

b) a declaratory judgment favorable to the defendants is obtained from a court of competent jurisdiction, as provided for in the Voting Rights Act;

c) the state legislature of Georgia enacts a scheme for judicial elections which is precleared, and an election is conducted pursuant to that scheme.

Should the event described in either subsection (a) or (b) occur, these judges may hold over until the state conducts new elections. Further, should the plaintiffs prevail in the declaratory judgment action, the incumbents whose terms end in 1990 may continue to serve in the unprecleared judgeships for 150 days. In the event of any vacancy in an unprecleared judgeship by reason of death, resignation, or otherwise, the Governor may make appointments as authorized by the laws of Georgia.

The remainder of our Order is unchanged. The most recently created judgeships, to which no judge has every been elected, will continue to go unfilled until precleared. Any decisions by incumbent judges holding over pursuant to this Order are of course valid. The Court's adjudication of this matter is now final.

SO ORDERED.

BOWEN, District Judge, Concurring Specially.

I concur in this Court's order to grant defendants' motion for rehearing, reconsideration, etc., originally filed December 15, 1989, and subsequently renewed. My concurrence with the order granting some of the relief sought in said motion is not indicative of any retreat from the position expressed in my dissent to the December 1, 1989, majority opinion. I concur in the grant of defendants' motion for rehearing and reconsideration because it allows most of the judicial machinery of the State of Georgia to remain in operational status quo while the merits of these controversies are litigated in this Court, on appeal, and, perhaps, in the District of Columbia.

I continue in my firm belief that where the only change in an existing judicial circuit is to increase the number of judges, such is not a "covered change" within the purview of section 5 of the Voting Rights Act.

In the December 1, 1990, opinion and order, a majority of this Court found a potential for discrimination because of the possibility of perpetuating "anti-single-shot" voting practices through circuit-wide elections of judges to numbered posts by majority vote. Also, it seems that the majority was unwilling to balance fundamental interests of the State of Georgia against a mere potential for some dilution of minority interests remediable only by drastic, intrusive redistricting. To me, the concept of a judge with a special interest constituency is no less anathematic today than it was last December.

The principles I embrace are not heard only in the "cannonade" of my earlier dissent. Such concepts are emerging from diverse courts. In *State of Mississippi v.*

USA, No. 87-3469, (D.D.C. August 2, 1988), Sentelle, Charles R. Richey, and Oberdorfer, JJ, granting a motion for summary judgment, observed " . . . there was no opportunity for single-shot voting prior to 1964, and there is no opportunity for single-shot voting today. Thus, undisputed facts establish that the legislation increasing the number of *numbered* judges in *multijudge* districts does not effect any retrogression in minority voting strength, and hence has no discriminatory effect." (emphasis added). Moreover, the Fifth Circuit Court of Appeals in *League of United Latin American Citizens v. Clements*, Nos. 89-8095, 90-8014, (5th Cir. May 11, 1990), noted " . . . that judges do not represent a specific constituency." Observing that "district courts in Texas consist of individual judges who decide their cases alone", that "there can be no share of the authority vested in each judge", and that "the full authority of that office is exercised exclusively by one individual" the court ruled, "consequently, the county-wide election of district court judges does not violate the Voting Rights Act." Ibid.

I hasten to add that the aforementioned two cases, while analogous, are neither controlling nor persuasive precedent here. Because they arose under different applications of the Voting Rights Act, the standard under which those cases were decided was that of "discriminatory effect," not the "potential for discrimination" found in this case. However, since section 2 of the Voting Rights Act is arguably more intrusive than is section 5, it is not illogical to conclude that a practice which does not have the *effect* of discrimination is also without a *potential for* discrimination.

Thus, while I would prefer for this Court to reopen the entire matter and reverse its decision regarding the statutes which increase the number of judgeships in previously existing judicial circuits, I must nevertheless concur in a result which permits the operational status quo of Georgia's judicial system for the duration of litigation.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA BRUNSWICK DIVISION

TYRONE BROOKS, et al., Plaintiffs,	)	
vs.	)	Civil Action No. 288-146
STATE BOARD OF ELECTIONS, et al.,	)	FILED JUN 25 '90
Defendants.	)	

Before KRAVITCH, Circuit Judge, EDENFIELD, Chief District Judge, and BOWEN, District Judge.

ORDER

Pursuant to Fed. R. Civ. P. 60(a), the court, of its own initiative, corrects its Order of May 29, 1990, to add language that was inadvertently omitted.

Fed. R. Civ. P. 60(a) provides:

> **(a) Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

In accordance with the above rule, the court orders that the clause, "Provided that the State files a declaratory judgment action within 90 days," precede the language on page 2 of the Order of May 29 that reads "Incumbents whose terms end in 1990 may continue to serve in unprecleared judgeships until one of the following events occurs: . . . . " Thus, the Order will read: "Provided that the State files a declaratory judgment action within 90 days, incumbents whose terms end in 1990 may continue to serve in unprecleared, judgeships until one of the following events occurs: . . . . "

Because the above language was omitted from the May 29 Order, the 90 days shall run from the date this Order is filed.

* * *

BOWEN, District Judge, dissenting. It is my view that the business of this court is to resolve disputes and to accord appropriate relief in the cases which arise before us. It is not our proper function to condition an order upon the filing of another lawsuit in another court.

The filing of a lawsuit or an appeal is a matter of strategy best left to the unfettered judgment of the parties. Such a decision should not be mandated by the court through the imposition of conditions; especially one which, at best, leaves a party little choice.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

TYRONE BROOKS, et al., Plaintiffs,	)	
v.	)	Civil Action No. 288-146
STATE BOARD OF ELECTIONS, et al.,	)	FILED JUN 22 '90
Defendants.	)	

NOTICE OF APPEAL

Defendants, State Board of Elections and Max Cleland, Secretary of State and Chairman of the Georgia State Board of Elections, hereby appeal to the Supreme Court of the United States from this court's orders and judgments entered in this case, including specifically this court's orders of December 1, 1989, March 29, 1990 and May 29, 1990. Jurisdiction in the United States Supreme Court is provided, inter alia, by 28 U.S.C. § 1253 and 42 U.S.C. §§ 1973b(a)-1973c.

This 22 day of June, 1990.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have on this date served a copy of the foregoing pleading on counsel for plaintiffs by mailing a copy of same to them addressed as follows:

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Ms. Kathleen L. Wilde
American Civil Liberties Union Foundation, Inc.
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Mr. J. Gerald Hebert
Attorney, Voting Section
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United States Department of Justice
P.O. Box 66128
Washington, D.C. 20036-6128

This 22 day of June, 1990.

/s/ David F. Walbert
David F. Walbert
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December 29, 1989

The Honorable Richard Thornburg
Attorney General
U.S. Department of Justice
10th and Constitution Avenues, N.W.
Washington, D.C. 20530

Mr. James P. Turner
U.S. Department of Justice
Room 716
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Washington, D.C. 20530

Re: Section 5 Review of Superior Court Judgeships In the State Of Georgia

Gentlemen:

This letter is submitted on behalf of the State of Georgia in connection with its submission to you under Section 5 of two superior court circuit additions and the addition of new judgeships that have been enacted, and not been precleared, since November 1, 1964.[1] Accompanying this letter, you will find the information you

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[1] In proceeding with this submission, the State of Georgia and its officers specifically reserve the issues raised in *Brooks v. State Board of Elections* concerning whether Section 5 reaches the matters addressed in the submission. No appeal has yet been taken from the 2-1 decision of the district court so holding. (The time for filing a notice is presently toiling as a result of the pendency of the defendants' Motion for Rehearing.)

requested in your letter of August 26, 1988. Because of the tremendous volume of information requested and submitted, we also submit these separate comments on the issues before you and review some of the pertinent information relevant to your determination.

The most important decision construing the scope of Section 5 in a case such as this one is *Beer v. United States*, 425 U.S. 130 (1976). The Supreme Court there held that Section 5 preclearance is mandated in the absence of retrogression or purposeful discrimination. Neither arguably could be said to exist here. See also *City of Lockhart v. United States*, 460 U.S. 125 (1983).

A. Retrogression.

1. Additional Judgeships. It is undisputed that each and every new judgeship at issue that has been added is elected under precisely the same election mechanism that both preceded the new seat and preexisted the effective date of Section 5. No evidence suggests the contrary, and neither the private plaintiffs nor the Justice Department disputed this fact in their briefs in *Brooks v. State Board of Elections*. All judges of the superior courts of the State of Georgia have been nominated by the voters of their entire respective circuits for nearly a century pursuant to state constitutional and statutory provisions, and since the 1983 Constitution was adopted, they have been elected at the time of the primary elections in non-partisan elections by the voters in their respective circuits.[2] It is also

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[2] Prior to a 1966 constitutional amendment, superior court judges were elected at the General Election by the voters of the

(Continued on following page)

undisputed that, prior to the effective date of Section 5, general statutes of state-wide application in Georgia mandated the election of superior court judges by separately designated seats and by majority vote.[3]

With new judges being elected in the same fashion as preexisting judges, the "power" of minority voters vis-a-vis each new judgeship necessarily is identical with their power vis-a-vis each preexisting judgeship in the circuit. The preexisting electoral system was merely replicated with the addition of new judgeships. The relative "strength" of black and white voters is unchanged. Under the Supreme Court's decision in *Beer*, one cannot make a good faith argument that retrogression might exist in connection with the addition of new judgeships in Georgia.

The underlying purpose of Section 5 is not implicated in this case. As the Supreme Court explained that purpose in *Beer*:

(Continued from previous page)

entire state. As a practical matter, those elections would rarely have been contested since only one party was fielding candidates.

[3] When those state-wide laws were codified in 1964, that codification reflected the preexisting practice that had been expressed in a variety of statutes and party practices. Those earlier practices are not relevant to the present issue, however, since the significant question is what was in effect and required by law when Section 5 became effective, and it is undisputed that the law for the entire State of Georgia at that time mandated circuit-wide voting, majority vote, and separate designated seats. See accompanying submission letter from Ms. Carol Cosgrove, and Department of Justice amicus brief in *Brooks v. State Board of Elections*, pp. 17-20.

> By prohibiting the enforcement of a voting-procedure change until it has been demonstrated to the United States Department of Justice or to a three-judge federal court that the change does not have a discriminatory effect, Congress desired to prevent states from "undoing or defeating the rights recently won" by Negroes. H.R. Rep. 91-397, p. 8. Section 5 was intended "to ensure that the gains thus far achieved in minority political participation shall not be destroyed through new discriminatory procedures and techniques." S. Rep. No. 94-295, p. 19.

Beer v. United States, supra, at 140-41.

No such thing arguably occurs with the addition of new judges elected the same as their predecessors.

Neither could there be any basis for suggesting that the two new circuits at issue, the Alcovy and Houston Circuits, could cause retrogression. According to the 1980 census, Houston County had a total population of 77,605, 20 percent of whom were black. The Macon Circuit, which originally consisted of Bibb, Houston, Crawford and Peach Counties, would have had a total population of 254,696, 33.7 percent of whom would be black, under the 1980 census. Under the new Macon Circuit, blacks comprise 39.6 percent of the 1980 population. Black voters in the original Macon Circuit did not in any way "retrogress" as a result of the change.

The Alcovy Circuit was created by taking Newton County from the Stone Mountain Circuit and Walton County from the Western Circuit. Rockdale County (36,747 total population, 9 percent black in 1980), which originally was part of the Stone Mountain Circuit as well

and lies directly between Dekalb and Newton Counties, was precleared as a separate circuit on August 26, 1988. The removal of Newton County (34,489 total population, 25.2 percent black in 1980) from Dekalb County (483,024 total population, 26.9 percent black in 1980) did not cause any deviation or retrogression in the position of minority voters. That is particularly true in light of the rapid demographic changes Dekalb County has experienced over the last 25 years. Dekalb's total population has grown significantly over that period and the percentage of black residents in the county has grown from a very low level in 1960 to 13.7 percent in 1970 and, as noted, to 26.9 percent in 1980. Current estimates are that Dekalb County was approximately 32 percent black in 1988, and demographic trends point to Dekalb County continuing to evolve similar to Fulton County in becoming a black majority county in the near future. Allowing that county to stand as its own circuit would, under the Justice Department's usual analysis, therefore be considered very progressive, rather than retrogressive.

Neither did separating Walton County from the Western Circuit adversely affect black voters. The remainder of the Western Circuit consists of Clarke County (1980 population of 74,498, 23.3 percent black) and Oconee County (12,427 total population, 10.1 percent black in 1980). Walton County had a 1980 population of 31,211, 20.7 percent of whom were black.

Minority voters were not arguably disadvantaged in any way with the creation of either the Alcovy or Houston Circuits. If anything, the opposite is true and, if recent demographic trends continue, black voters will

achieve significant advantages under the Justice Department's voting strength analysis.

B. Purpose.

All evidence relating to the creation of the new judgeships at issue and the creation of the Alcovy and Houston Circuits proves that these actions had nothing to do with racial discrimination. Each related simply to the undisputable need to increase the size of the judiciary to allow it to function as effectively as possible and handle the extraordinary increase in caseload that has occurred since 1964 and which, particularly on the felony level, has been increasingly meteorically in recent years. In *Beer v. United States, supra,* the Supreme Court stated that an objection may be appropriate under the "purpose" clause of Section 5 if and only if the new legislation "so discriminates on the basis of race or color as to violate the Constitution." *Id.* at 141. See also *City of Mobile v. Bolden,* 446 U.S. 55 (1980) (pertaining to intentional constitutional voting discrimination). The enactments at issue here cannot rationally be said to run afoul of this prohibition.

With the rapidly growing demands on the judiciary and the corresponding increased pressure for adding judges that has occurred over the past 20-30 years, Georgia has successfully used objective and systematic methods for determining where and when superior court judgeships will be added and when circuits might be created. Seventeen years ago, an Administrative Office of the Courts was created (1973 Ga. Laws, p. 288), and it began to collect caseload statistics to compare the relative

need for new judges in the various circuits. The compilation of caseload statistics soon became more refined, and the need for new judges was assessed by examining not just the raw caseload, but also the kind and character of the criminal and civil cases brought in the various circuits. For example, felony cases are more time consuming than misdemeanor cases, and misdemeanor cases are not handled in Superior Courts in certain areas where lower courts exist for those cases. Caseload has some relation to population, but it is by no means determined by that factor alone. Rather, a wide variety of factors determine the caseloads and the judicial time demands for particular cases from circuit to circuit.

The caseload information is distilled into two Weighted Caseload Systems, one of which is called the "Ratio Weighted Caseload." All cases are "translated" into their "felony equivalents," and the present policy of the Judicial Council of Georgia is that a value of 900 or more felony-equivalent cases, as measured by the Ratio Weighted Caseload System, justifies an additional judgeship. This analysis, which is described further in the documents provided you in connection with the new judgeships, is basic to the recommendations of the Judicial Council to the General Assembly for the creation of new judges. Since these recommendations have been developed and made, which goes back to 1973, the General Assembly has not created any new judgeships that had not been previously recommended by the State Judicial Council and found to be justified based on this case demand analysis.

No question of race has ever played any part, or was ever raised, in connection with the need for the addition

of the new judgeships at issue or the creation of the two new circuits.

There is no instance where any of the new judgeships or circuits might have been supported and enacted at the insistence of white legislators, but opposed by black legislators (or members of the community). To the contrary, the enactment of the statutes at issue and the creation of the new judgeships, to be elected pursuant to the general laws of the State of Georgia on a circuit-wide, majority vote, separate seat basis, were supported by black members of the General Assembly generally and the respective local delegations in particular. For example, in connection with the most recent 1989 judgeships that were added, Mr. Roy Allen was the sponsor of the Eastern Circuit (Chatham County) addition. Mr. Allen is a black attorney and Representative from Savannah. The black members of the local delegation similarly supported the new 1989 judgeship in the Chattahoochee Circuit, and the Fulton County delegation, which is predominantly black, supported the addition of a new judge to the Atlanta Circuit (Fulton County).

You have raised a question of why, in multi county circuits, a new judgeship may have been added rather than the circuit being split into two circuits. Since the addition of new judgeships to preexisting circuits was not retrogressive and race never played any role or was ever raised in connection with the addition of new judgeships, and since there is no evidence that a new circuit was ever created or not created on any occasion because of some racial reason, there is no place at all for this hypothetical inquiry under Section 5. Nevertheless, the following further response will be made to your inquiry.

As a practical matter, there are a variety of strong reasons that generally weigh against the creation of new circuits, even though new ones have occasionally been justified. The Judicial Council of Georgia has repeatedly expressed its opposition to new circuits. The Council's policies are included in the new judgeship analyses and recommendations that are being provided to you at this time, and the various difficulties in the creation of new circuits will therefore not be reiterated in full here. What is undisputable, however, is that the reasons for not creating more new circuits has nothing to do with race.

To understand this issue fully, one must appreciate the general desirability of having circuits with more than one judge. Historically, that was not possible without having extremely large circuits geographically, which would have required extensive travel and circuit riding time by the judge, the district attorney, investigators and other staff associated with the court and the prosecutor's office. With the increasing number of judges required to handle modern criminal and civil caseloads, however, it is now possible to have multi-judge circuits in most places without inordinately large circuits. There now are two or more judges in 44 of the 45 superior court circuits in the state. That is extremely valuable to avoid severe practical difficulties that occur in one-judge circuits when the one judge might be recused or otherwise disqualified to serve, leaving no other judge in the circuit to hear a matter. Similarly, conflicts arose in one-judge circuits when there was need for a judge to hear a matter in two different counties in a circuit at a particular time. For these reasons, and the many other compelling practical justifications expressed in the policies adopted by the

Judicial Council of the State of Georgia, the great majority of new judgeships have been added to existing circuits, rather than by creating a new circuit.

Your hypothetical inquiry about the creation of new circuits, rather than the addition of new judgeships to existing circuits, appears to have implicit in it the assumption that new circuits could be created that would be "controlled" by black voters (under the Department's de facto rule that a 65 percent black population in a jurisdiction creates black voter control). That is not the case. This possibility has been examined in connection with the preparation of this submission, and an intentional effort to draw district lines in order to create such a circuit would not be successful.

According to the 1980 census, there were 17 counties in Georgia with a black population of 50 percent or more outside of Fulton County. Fulton County is majority black and it already constitutes a separate circuit (the Atlanta Circuit). These 17 counties are, without exception, rural, they have relatively small populations, and there Ratio Weighted Caseloads are relatively low. One could not justify a circuit in any of those counties. Furthermore, it would be impossible to join any of these counties in a relatively compact and contiguous fashion so as to justify their being two superior court judges in a new circuit with a 65 percent black population. That could not be done even to justify a one-judge circuit.[4]

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[4] At most, it might be possible to intentionally redraw circuit lines on the basis of race to combine counties so as to

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In short, the creation of new circuits in Georgia presents no issue of substance that could raise a Section 5 issue, even if this hypothetical inquiry were a proper part of your review.

C. Section 2 Review.

We are cognizant of the fact that your newest regulations claim that the DOJ, under Section 5, has the additional authority to object to a practice where you find "that a bar to implementation of the change is necessary to prevent a clear violation of amended Section 2." 28 C.F.R. §51.55(2). Before reviewing the evidence relevant to Section 2, we wish to specifically object to your purported claim of authority to object, absent proof of retrogression or purposeful discrimination.[5]

(Continued from previous page)

create a black population majority for a one- or two-judge circuit using the 1980 census. The slight black population majority in such a circuit, however, may not exist with the actual current or the likely future population. Whether such a change would be progressive or retrogressive (as a "submergence" of black voters under past DOJ analysis), is questionable.

[5] We recognize that the Justice Department has acknowledged that, in administering Section 2 within Section 5, the possibility of a Section 2 objection, in the absence of retrogression, might arise only in an "exceedingly rare case." 52 Fed. Reg. 498 (1987). Still, we feel any assumption of such authority by the Justice Department is inappropriate. Section 5 was not amended in 1982 by Congress, and as you know, the Justice Department itself has filed briefs in court asserting several different positions concerning this issue, including the position

(Continued on following page)

There is an additional threshold problem in considering a Section 2 objection here which arises from the fact that judges are the elected officers at issue. While Section 5 is broadly written to cover all kinds of elections, the results test of Section 2 is limited to those situations in which minority voters are deprived of an equal opportunity to "elect representatives of their choice." That language, and the purpose of the expanded Section 2, arose, of course, from the Supreme Court's decisions in *City of Mobile v. Bolden*, 446 U.S. 55 (1980) and *White v. Regester*, 412 U.S. 755 (1973). Those decisions, similar cases in the lower courts, and congressional testimony, reports and deliberations, focused exclusively on the need for ensuring political "access" to representational government. The function of judges, however, has nothing to do with "representation." On the contrary, unlike elected representatives, who are supposed to advocate their constituents, views, the ideal of the judiciary is the opposite. The subdividing of the trial court judiciary into separate political areas is particularly inappropriate since, unlike the collegial action of elected representative bodies, every trial court judge carries the entire power and authority of

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(Continued from previous page)

that it had no authority to make a Section 2 objection. As you no doubt further know, what legislative history exists to support this concept of your expanded jurisdiction was written by private civil rights attorneys in the respective committee report and for inclusion into the Congressional Record. In fact, the Congress did not consider and did not intend to so expand Section 5, and we urge you to interpret your authority in this case consistent with the historic purpose of Section 5.

the court. They act without the concurrence of others elected from separate subdistricts within the jurisdiction.

Even if a Section 2 review of the Georgia Superior Court judgeship statutes here was appropriate in this proceeding, the evidence unequivocally demonstrates that an objection could not be predicated on that basis. No one could argue that the new circuits at issue or the addition of new judgeships must be "barred" in order "to prevent a clear violation of amended section 2." 28 C.F.R. §51.55(2). The evidence bearing on that issue is as follows:

1. Judicial Elections. There have been nine judicial elections in Georgia in which black and white candidates have opposed one another, including elections for the State Court of Appeals, the superior court, and the state court. A black candidate won seven of these nine races. In an eighth, the black candidate was unsuccessful, but neither did he carry a majority of the black voters (H. Pierre v. Edward Johnson in the Atlanta Circuit in 1988).[6] In each of these nine races, the majority of the registered

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[6] In the one race where a black candidate was unsuccessful while carrying a majority of the black voters, which occurred in the Chattahoochee Circuit, the determinative factors in that race were not racial. In Muscogee County, which includes the great bulk of voters in that circuit, Robert Benham (black) defeated three white opponents by a vote of 11,342 to 6,058 in running for the Court of Appeals. There is an incumbent black state court judge there, The Honorable John Allen, who was unopposed for election in 1988. In a judicially related election for Municipal Court Marshal in Muscogee County in 1988, Billy R. Weary, Jr. (black) beat the incumbent white marshal in a runoff.

voters in the jurisdiction was white. In 14 additional elections, black candidates for state and superior court have been elected without opposition.[7]

These facts leave no room for complaint under Section 2, and they are far different than the evidence in the several other states that have been reviewed by the Justice Department under Section 5. Where black lawyers have sought election, they have been successful in contested or uncontested elections over 90% of the time in jurisdictions with white voter majorities. This evidence alone precludes a Section 2 challenge under the threshold criterion in *Thornburg v. Gingles*, 478 U.S. 30, 48-49 (1986) (dilution claim is available only where a bloc voting majority *usually* defeats minority candidates).

2. Judicial Nominating Commission. In the State of Georgia, over two-thirds of incumbent superior court judges were initially appointed to the court, either because of a vacancy in an existing seat or through an initial appointment to a new seat.[8] This percentage will likely increase in the future because, with the elimination of partisan elections beginning in 1984, the defeat of incumbent judges at the polls will tend to decrease further. The importance of appointments makes Georgia's

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[7] Black incumbent judges have been unopposed for the Augusta Circuit, the Eastern Circuit, the Atlanta Circuit, the Fulton County State Court (same electorate as the Atlanta Circuit), the Dekalb County State Court (same electorate as the Stone Mountain Circuit) and the Muscogee County State Court (which includes most of the electorate from the Chattahoochee Circuit).

[8] The evidence submitted with the submission indicates that 93 of 137 incumbents were appointed.

judicial selection and election procedures much different than those in the other states which the Justice Department has reviewed where there either was no mechanism for appointment or, as in Louisiana, for example, a judge appointed to a vacancy was not permitted to run for reelection to the seat.[9]

Because gubernatorial appointment of superior court judges from the names recommended by the Judicial Nominating Commission is critically important in assessing Georgia's judicial selection and election system, the following information should be noted. The present commission originated with an executive order of Governor Jimmy Carter on June 18, 1973 as a successor to the Governor's earlier commission on appellate judicial selection, which was created by executive order on December 3, 1971. Since its creation, all vacancies in the superior court have been filled by gubernatorial appointment only upon the recommendations of the Judicial Nominating Commission.[10]

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[9] Georgia's combined system of appointment and election has been characterized in operation as working somewhat akin to a Missouri plan. In this regard, the election of Georgia superior court judges is very different than the election of members of the General Assembly, where, by law, vacancies may only be filled by special election.

[10] On occasion, there has been an instance where a candidate was elected to a term commencing on January 1 of the next year after the election, and the governor has appointed that elected candidate to the remainder of a vacant term since he or she would be taking office in any event within a few weeks. It is believed that at least several appointments have occurred in those circumstances without formally going through the Judicial Nominating Commission.

The Judicial Nominating Commission receives applications for superior court vacancies from anyone who chooses to apply. Applicants, while usually called "nominees," need not be "nominated." They are simply all individuals who fill out and submit the Commission's application form. Anyone who does that will be fully considered and has been given an opportunity for an interview for any superior court opening. The Commission notifies all members of the State Bar in the jurisdiction involved that nominations are being taken, except in Fulton County and Dekalb County where there are thousands of Bar members. In those two counties, the Commission gives notification by publication in the official legal newspapers of the counties, the presidents of the local Bar Associations (including the predominantly black associations) are notified, and all lawyers who commonly appear in the local courts are naturally aware of openings regardless of any such publicity.

Since the inception of the Judicial Nominating Commission, black "nominees" or "applicants" have fared better than whites in filling superior court vacancies. You are being provided in this submission a list of all applicants for superior court positions from the inception of the Judicial Nominating Commission onward. Although race is not kept in any records, we believe that we have accurately designated the race of all of the nominees on the enclosed list. Comparing the number and race of nominees to the actual appointments by the governor

indicates that black nominees enjoyed a success rate approximately 50% higher than that of white nominees.[11]

3. The Relative Number of Black and White Lawyers. Under Georgia's constitution, superior court judges are limited to those persons who have been a member of the Bar of the State of Georgia for a minimum of seven years. As a practical matter, incumbent judges, of course, have generally been members of the Bar far longer than that. Among present incumbents, the average age of superior court judges at the time of their taking office was just over 47 years.

While no records are kept of the race of lawyers, the best efforts made to identify black lawyers presently admitted to the State Bar indicate that black lawyers comprise three percent of the Bar. Black superior court judges, by comparison, are six of the incumbent 137 judges, or 4.4 percent.[12] More importantly, in determining whether discrimination exists in some form, the percentage of black judges presently sitting must be compared

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[11] Of the 13 specific circuits named in the plaintiffs' complaint in the *Brooks* case, no blacks have ever sought appointment in seven of the circuits (Dougherty, Macon, Ocmulgee, Pataula, Southern, Southwestern and Toombs), and one black person has been a nominee in the Brunswick, Augusta, Chattahoochee, Eastern and Stone Mountain Circuits. In three of those instances, the black nominee was appointed to the superior court. (This information does not include the nominees for the newest judgeships since appointments have not yet been made.)

[12] But for the injunction the plaintiffs sought in *Brooks*, this number could very well have increased.

with (1) the percentage of lawyers who are black who have the seven year minimum, and (2) the percentage of black lawyers who have the level of experience and the age typified by judges generally.

Because the number of black lawyers has risen rapidly in Georgia in recent years, the percentage of the Bar that is black that has the requisite seven-year qualifications, and the typical level of experience exemplified by judges as a whole, is much lower. In sum, the percentage of blacks serving on the superior court, while lower than the percentage of the population as a whole, is in fact significantly higher than the percentage in the relevant "pool" of eligible persons.

This fact cannot be ignored in assessing the actual operation of the appointment and election system in Georgia. The relatively low number of blacks on the superior court is not the result of discrimination in either appointment or election. It results, instead, from the fact that there have been relatively few black lawyers, particularly until recently, practicing in Georgia. As the information submitted to you indicates, there are entire superior court circuits where there are no black persons eligible to serve as a superior court judge.

Legally, this is of critical importance in applying Section 2. Since the election system is not causing discrimination in keeping black lawyers from the bench, there can be no Section 2 violation. The State's election laws are not the "proximate cause" of the number of blacks serving on the superior court, and they cannot be deemed in violation of Section 2. The State's position here is in full agreement with the Supreme Court's recent

pronouncements that a defendant's practices cannot be adjudged illegal where they, in fact, have not discriminated against blacks, and that, in making that determination, the relevant pool of qualified persons is the sole basis for comparison. *See, e.g., Wards Cove Packing, Inc. v. Atonio,* 57 U.S.L.W. (1989); *J. A. Croson. Inc. v. City of Richmond,* 57 U.S.L.W. 4132 (1989); *Thornburg v. Gingles, supra.*

In conclusion, we respectfully urge that all statutes before you be precleared at this time. The evidence supporting Georgia's submission is compelling, and particularly so in comparison to that considered by you in reviewing other states' judicial laws.

Thank you for this opportunity to provide you with these comments, and please contact the undersigned if there is anything you would like explained further.

Sincerely,

/s/ Michael J. Bowers
MICHAEL J. BOWERS
Attorney General of the
State of Georgia

/s/ Carol Atha Cosgrove
CAROL A. COSGROVE
Senior Assistant Attorney
General

/s/ David F. Walbert
DAVID F. WALBERT
Special Assistant Attorney
General

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

April 25, 1990

Honorable Michael J. Bowers
Attorney General
State of Georgia
132 State Judicial Building
Atlanta, Georgia 30334

Dear Mr. Attorney General:

This refers to the following matters which are before the United States Attorney General for review under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, with respect to the State of Georgia:

1. the January 2, 1990, request for reconsideration of the June 16, 1989, objection to the establishment of 48 additional superior court judgeships, the specification of the date on which the first full term of office commenced for each new judgeship, and the creation of two additional superior court circuits and the district attorney positions to serve those circuits;

2. the January 2, 1990, submission of five additional superior court judgeship created in 1989, and the specification of the date on which the first full term of office commences for each judgeship; and

3. the April 3, 1990, submission of five additional superior court judgeships created in 1990, and the specification of the date on which the first full term of office commences for each judgeship.

On March 2, 1990, we received the information necessary to complete our review of the reconsideration request and to complete the January 2, 1990, submission.

The changes now before the Attorney General for Section 5 review date back to 1967 and involve a far-reaching expansion of the superior court system undertaken over a period of twenty-three years. This includes over one-third of the system's 148 elective judgeships, and involves 30 of the 45 superior court circuits in the state. Thus, while we have been fully cognizant of the state's request for expedited review, the comprehensive nature of these submissions, as well as the importance of the changes to the state and its minority citizens, has required a considerable amount of time for us to give the kind of careful consideration due a submission of such proportions.

At the outset, we note that the expansion of the superior court system occasioned by the establishment of the additional judicial positions must be analyzed in the context of the method utilized to elect the judges. *City of Lockhart v. United States*, 460 U.S. 125, 131-132 (1983). *See also McCain v. Lybrand*, 465 U.S. 236, 255 n.27 (1984). In Georgia, superior court judges are elected at large within each circuit. A majority vote requirement exists in both the primary and general elections, and candidates must run for a designated position which precludes voters from using the technique of single-shot voting. According

to the 1980 Census, only one circuit (the Atlanta Circuit) is majority black in population, and no circuit is majority black in voting age population. In addition, our information is that incumbency plays an important role in the electoral process for the superior court in that incumbents rarely are defeated. We understand that for about three-fourths of the current judges such incumbency was first established by their having been appointed to the bench.

We note further that most interracial judicial elections have occurred in the Atlanta Circuit, and these elections appear generally to exhibit a pattern of polarized voting. *See also Busbee v. Smith*, 549 F. Supp. 494, 499 (D.D.C. 1982), *sum. aff'd*, 459 U.S. 1166 (1983). No black ever has defeated a white incumbent superior court judge and, while black incumbents on the superior court also have been elected, they have never faced opposition. Only five blacks ever have served on the superior court in this circuit; three obtained gubernatorial appointments and two gained their seats in contests in which no incumbent was running (a circumstance which appears rarely to occur in superior court elections). The result is that only three of the eleven sitting judges are black although the circuit is 51 percent black in population.

Outside the Atlanta Circuit, only three blacks ever have served on the superior court, and these three all initially were appointed to the bench. Two of the three were then opposed in subsequent elections, and both elections appear to have been characterized by polarized voting. In addition, since there are few judicial elections to analyze outside the Atlanta Circuit, it is appropriate to consider contests for other elected offices in these circuits. Our review of a broad range of evidence in this

regard indicates that polarized voting generally prevails in all of the superior court circuits now under review and there is a consistent lack of minority electoral success in at-large elections. Thus, it appears that, in the totality of the circumstances, black voters in these circuits have a limited opportunity to elect their preferred candidates, even when blacks enjoy the advantages of incumbency by initially having been appointed to the bench.

Two features which are of particular import in the superior court electoral system are the majority vote and designated post requirements. It is well recognized that these requirements, acting in tandem, tend to minimize black voting strength in an at-large system. See, *e.g.*, *City of Rome v. United States*, 446 U.S. 156 (1980). Indeed, there is substantial information indicating that the majority vote requirement was adopted in 1964 by the state precisely for that invidious purpose; the designated post requirement was adopted in the same legislation. The state has advanced no persuasive nonracial reason for continuing the use of these features, especially since there appear to be alternative methods for electing superior court judges which would not similarly minimize and submerge black voting strength.

In addition, the state has not shown how its interests are served by circuitwide elections in many of the circuits now at issue where the at-large election feature is in apparent violation of Section 2 of the Voting Rights Act. *Thornburg v. Gingles*, 478 U.S. 30 (1986). While a state may have more flexibility under Section 2 in justifying the at-large election of judges than it does with respect to other elected officials, we look to the submitting authority to proffer persuasive justifications. Here, it has not done so.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect, and preclearance also must be denied where a clear violation of Section 2 is found to exist. See *Georgia v. United States*, 411 U.S. 526 (1973); Procedures for the Administration of Section 5 (28 C.F.R. 51.52 and 51.55(b)). In this connection, we in particular cannot ignore the substantial information which has come to our attention suggestive of the racially discriminatory purpose underlying the adoption of a major feature of the present system – the majority vote requirement and, possibly, the designated post as well. As the Supreme Court has noted, "an official action, . . . , taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the [Voting Rights Act]." *City of Richmond v. United States*, 422 U.S. 358, 378 (1975).

In light of these considerations, therefore, I cannot conclude, as I must under the Voting Rights Act, that the state has carried its burden of showing that the expansion of an electoral system, which includes the restrictive majority vote and designated post features, through the additional judgeships under review here meets the preclearance standards. Accordingly, on behalf of the Attorney General I must decline to withdraw the June 16, 1989, objection to the 48 additional judgeships and the related changes concerning the dates on which terms of office commenced, and also must object to the ten judgeships established in 1989 and 1990, and the dates on which terms of office are to commence.

With respect to the creation of two additional circuits (Alcovy and Houston) and the district attorney positions therefor, our analysis indicates that these changes have met the preclearance standards. Accordingly, on behalf of the Attorney General, the objection to these changes is withdrawn.

As you are aware, the state retains the right under Section 5 to seek a declaratory judgment from the United States District Court for the District of Columbia that the changes for which Section 5 clearance has been denied do not deny or abridge the right to vote on account of race or color. However, until a declaratory judgment is obtained or the objection is withdrawn, these changes continue to be legally unenforceable. 28 C.F.R. 51.10. In that regard, we would underscore the Court's observation in *Brooks v. State Board of Elections*, C.A. No. CV288-146 (S.D. Ga.), that the objection in no way implicates the validity of the actions taken by the judges who have been serving in the unprecleared judgeships. Memorandum Opinion and Order, at 21-22 (Dec. 1, 1989). We are fully aware of the importance of the additional judgeships at issue to the proper functioning of the Georgia judicial system, and we will continue to work with the court and the parties in *Brooks* to assure that those needs are met consistent with the requirements of Section 5.

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us of the course of action the State of Georgia plans to take regarding these matters. If you have any questions concerning this letter, you may feel free to telephone Mark A. Posner, an attorney in the Voting Section (202-724-8388).

Because the status of the submitted changes is at issue in *Brooks v. State Board of Elections*, we are providing a copy of this letter to the court in that case.

Sincerely,

/s/ John R. Dunne
John R. Dunne
Assistant Attorney General
Civil Rights Division

cc: Honorable Phyllis A. Kravitch
United States Circuit Judge

Honorable B. Avant Edenfield
United States District Judge

Honorable Dudley H. Bowen, Jr.
United States District Judge

§ 1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgment of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission,

the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

21-2-501. Majority vote as prerequisite for nomination or election; holding of run-off primary or election when no candidate receives majority vote; procedure for run-off primary or election generally; run-off procedure for constitutional officers.

(a) Except as otherwise provided in this Code section, no candidate shall be nominated for public office in any primary or elected to public office in any election unless such candidate shall have received a majority of the votes cast to fill such nomination or public office. To be elected to the office of presidential electors, no slate of candidates of any political party or body shall be required to receive a majority of the votes cast; but that slate of candidates of a political party or body shall be elected to such office which receives the highest number of votes cast. In instances where no candidate receives a majority of the votes cast, a run-off primary or election between the candidates receiving the two highest numbers of votes shall be held. Unless such date is postponed by a court order, such run-off primary or election shall be held on the twenty-first day after the day of holding the preceding primary or election, provided that unless postponed by court order, a runoff in the case of a special primary or election shall be held no sooner than the fourteenth day and no later than the twenty-first day after the day of holding the preceding special primary or election, which run-off day shall be determined by the Secretary of State in a runoff to fill a federal or state office, or by the superintendent in a runoff to fill a county or militia district office. If any candidate eligible to be in a runoff withdraws, dies, or is found to be ineligible, the

remaining candidates receiving the two highest numbers of votes shall be the candidates in the runoff. The candidate receiving the highest number of the votes cast in such run-off primary or election to fill the nomination or public office he seeks shall be declared the winner. The name of a write-in candidate eligible for election in a runoff shall be printed on the run-off election ballot in the independent column. The run-off primary or run-off election shall be a continuation of the primary or election for the particular office concerned, and only the electors who were entitled to vote in the primary or election for candidates for that particular office shall be entitled to vote therein; and only those votes cast for the persons designated as candidates in such run-off primary or run-off election shall be counted in the tabulation and canvass of the votes cast. No elector shall vote in a run-off primary in violation of Code Section 21-2-235.

(b) In the event no candidate for the office of Governor, Lieutenant Governor, Secretary of State, Attorney General, State School Superintendent, Commissioner of Insurance, Commissioner of Agriculture, or Commissioner of Labor receives a majority of the whole number of votes cast in the general election, the Constitutional Officers Election Board shall continue the election for the office in which no candidate received a majority by immediately calling a run-off election and designating as candidates therein the candidates who received the two highest numbers of votes for the particular office concerned and who continue in life and have not declined to continue as a candidate. This run-off election shall be held on the third Tuesday immediately following the

general election. The run-off election shall be a continuation of the general election for the particular office concerned, and only the electors who were entitled to vote in the general election for candidates for that particular office shall be entitled to vote therein; and only those votes cast for the persons designated by the Constitutional Officers Election Board as candidates in such run-off election shall be counted in the tabulation and canvass of the votes cast. The provisions of Code Section 21-2-498 relating to the convening of the Constitutional Officers Election Board, transmission of the returns, in the general election, and the opening of the returns, their tabulation, canvassing, and publication shall apply to the run-off elections provided for by this subsection. On the Tuesday next following the run-off election, the Constitutional Officers Election Board shall convene, open, canvass, tabulate, and publish the returns of the run-off election or elections. The person having the highest number of votes entitled to be counted in the run-off election for each of such offices shall be declared duly elected.

SUPERIOR COURTS

15-6-4.1. Election of judges.

Each judge of the superior courts shall be elected by the electors of the judicial circuit in which the judge is to serve.

21-2-135. Designation of specific office sought where office has multiple officeholders with same title.

(a) In the case of a public office having multiple officeholders with the same title, each candidate shall, when qualifying with his party in the case of a primary and when filing his notice of candidacy in the case of an election and when filing his notice of candidacy in the case of a nonpartisan primary, designate the specific office he is seeking and name the person such candidate is seeking to succeed and give such other appropriate designation as may be required by the Secretary of State or election superintendent. The designation of the specific office and the name of the person whom a candidate is seeking to succeed in the case of a public office having multiple officeholders shall be entered on the ballot and ballot labels in such manner that in the ensuing primary or election such candidate shall only oppose the other candidate or candidates, if any, who designated the same specific office and the same name.

(b) In the case of the office of judge of a state court, judge of a superior court, Judge, of the Court of Appeals,

or Justice of the Supreme Court, the name of the person such candidate is seeking to succeed and such other designation as may be required by the Secretary of State or election superintendent shall be included in the title of office on the ballot in all nonpartisan primaries and elections.

EXHIBIT L

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

TYRONE BROOKS, et al., Plaintiffs,	)	CIVIL ACTION
v.	)	FILE NO. CV288-146
STATE BOARD OF ELECTIONS, et al., Defendants.	)	

AFFIDAVIT OF CHARLES BULLOCK

Upon being duly sworn, affiant Charles S. Bullock, III, Ph.D., provides the following testimony.

1.

I am currently the Richard B. Russell Professor of Political Science at the University of Georgia, and I have held that position since 1980. I specialize in legislative and southern politics, and I am experienced with and very familiar with statistical methods of analyses as they relate to politics and electoral analyses. I have served as a consulting or testifying expert in many previous election cases involving allegations of racial discrimination similar to those raised in this case.

2.

I have been engaged to serve as an expert on behalf of the defendants in this action for the purpose of

consulting and advising with them, reviewing various election returns and other documents pertinent to judicial selection and election, and performing statistical analyses in connection therewith, among other things. I have not been retained for the purposes of testifying in this case at trial, nor do I have any reason to expect that I would be called upon by defendants to testify as an expert at trial.

3.

In connection with the documents I have reviewed, I offer the following opinions, all of which are based upon statistical methodologies commonly relied upon by experts in my field. The information upon which my testimony herein is based is of the kind normally and reasonably relied upon by such experts.

4.

It is my understanding that no records are regularly kept by the State Bar of Georgia concerning the race of members of the Bar, but that the most accurate efforts to determine the percentage of members of the Bar who are black indicate that that percentage is no greater than three percent. In addition, the black members of the State Bar are skewed towards younger admissions, and particularly admissions within the past 10 years.

5.

There are presently six black superior court judges in Georgia out of a total of 137 active superior court judges in office. Four of these judges are judges in the Atlanta

Circuit, one is a judge in the Eastern Judicial Circuit, and another is a judge of the Augusta Judicial Circuit.

6.

In only one known instance has an incumbent black superior court judge ever been defeated by a white opponent, and this occured in the Chattachoochee Judicial Circuit in 1982. In that instance, the incumbent black judge, The Honorable Albert Thompson, had been appointed to the seat and had not run for judicial office before. There are a number of similar instances where white incumbent superior court judges have been defeated for office, and particularly there are instances where white incumbents who had been appointed to a vacancy were defeated in their first election for that office, as occurred in the case of Judge Albert Thompson.

7.

In addition, outside of the Atlanta Judicial Circuit, there is no instance in which a non-incumbent black candidate has ever been defeated in a race for a superior court seat.

8.

I have reviewed the names of the nominees for superior court judge appointments that have occurred for both new judgeships and vacancies since the Judicial Nominating Commission began to make recommendations to the Governor of the State of Georgia in 1972, together with information concerning the race of these nominees, which

information is of sufficient quality that it would be reasonably relied upon by experts in my field.

9.

Of the 13 specific circuits named in plaintiffs' complaint, this information indicates that no blacks have sought, through appointment, superior court judicial appointments during this period of time in the following circuits of those 13: Dougherty, Macon, Ocmulgee, Pataula, Southern, Southwestern, and Toombs. One black person has been a nominee during this period of time in the Brunswick, Augusta, Chattachoochee, Eastern and Stone Mountain circuits.

10.

Statistically, there is no significant disparity statewide, in the sense of an underrepresentation of blacks, in comparing the current number of black and white superior court judges with the relative numbers of black and white persons eligible to hold those offices in the State of Georgia.

This 22d day of June, 1989.

/s/ Charles S. Bullock, III
CHARLES S. BULLOCK, III

Sworn to and subscribed
before me this 22nd day
of June, 1989.

/s/ Thomas W. Tyrell
Notary Public

My Commission Expires: Notary Public, Clarke County, Georgia

My Commission Expires April 26, 1993

CERTIFICATE OF SERVICE

This is to certify that I have on this date served a copy of the foregoing pleading on counsel for all parties by mailing copies of same to them addressed as follows:

Ms. Kathleen L. Wilde
American Civil Liberties Union
Foundation, Inc.
44 Forsyth Street, N.W.
Suite 202
Atlanta, Georgia 30303

This 23 day of June, 1989.

/s/ David F. Walbert
David F. Walbert
Georgia Bar. No. 730450

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No. 90-332

Supreme Court, U.S.
FILED
SEP 24 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

GEORGIA STATE BOARD OF ELECTIONS and MAX CLELAND, Secretary of State and Chairman of the Georgia State Board of Elections,

Appellants,

versus

TYRONE BROOKS, LANETT STANLEY, BILL McKINNEY, JOE BEASLEY, VENUS E. HOLMES, MICHAEL ROBINSON, EDWARD BROWN, REV. DR. WILLIAM HOWELL, JOHN WHITE, MARY YOUNG-CUMMINGS, MARY BLACK, WILLIE MAYS, WILLIAM YOUNG, DEANIE FRAZIER, DIANE HARVEY-JOHNSON, REV. G.L. AVERY, JUANITA T. WILLIAMS, PATRICIA C. JONES, EDITH INGRAM GRANT, HENRY COOK, ANNIE SMITH, AND ERCEL BALDWIN,

Appellees.

On Appeal From The United States District Court For The Southern District Of Georgia

MOTION TO AFFIRM

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TABLE OF CONTENTS

Page

STATEMENT OF OBJECT 2

QUESTIONS PRESENTED 2

STATEMENT OF FACTS

Appellants' Statement of Facts 3

Relevant Facts Relied Upon by Appellees on This Motion 6

ARGUMENT

I. The Creation of An Elected Position Is a Covered Change Under Section 5 of the Voting Rights Act 9

II. *Haith v. Martin* Properly Decided The Scope of Section 5 and There Is No Basis for Reconsideration 15

CONCLUSION 17

APPENDIX SUPPLEMENT

H.B. No. 721, To Provide for an Additional Judge of the Superior Court of the Atlanta Judicial Circuit ..... App. 97

TABLE OF AUTHORITIES

Page

CASES:

Allen v. State Board of Elections, 393 U.S. 544 (1969) 11, 12

Berry v. Doles, 438 U.S. 190 (1978) 12

Blanding v. DuBose, 454 U.S. 393 (1982) 10

Chisom v. Edwards, 839 F.2d 1056 (5th Cir.), cert. den., 109 S.Ct. 390 (1988) 16

City of Lockhart v. United States, 460 U.S. 125 (1983) 10, 13

City of Petersburg v. United States, 410 U.S. 962 (1973), affirming 354 F.Supp. 1021 (D.D.C. 1972) 13

City of Pleasant Grove v. United States, 479 U.S. 462 (1987) 10

City of Port Arthur v. United States, 459 U.S. 159 (1982) 10, 14

City of Richmond v. United States, 422 U.S. 358 (1975) 13

City of Rome v. United States, 446 U.S. 156 (1980) 12

Clark v. Roemer, Civ. No. 86-435-A (M.D.La. Aug. 29, 1988) 11, 16, 17

Dougherty County GA Board of Education v. White, 439 U.S. 32 (1978) 11

Georgia v. United States, 411 U.S. 526 (1973) 13

Haith v. Martin, 618 F.Supp. 410 (E.D.N.C. 1985) (3 judge), summarily aff'd, 477 U.S. 901 (1986) ... 7, 10, 15

TABLE OF AUTHORITIES – Continued

Page

Holmes v. Danner, 191 F.Supp. 394 (M.D.Ga. 1961) 4

Kirksey v. Allain, 635 F.Supp. 347 (S.D.Miss. 1986) 16

Kirksey v. Allain, Civ. No. J85-0960(B)(S.D.Miss. April 3, 1986) 11

League of United Latin American Citizens Council v. Clements, 902 F.2d 293 (5th Cir.), en banc granted 902 F.2d 322 (1990)..... 17

Mallory v. Eyrich, 839 F.2d 275 (6th Cir. 1988) 16

Martin v. Allain, 658 F.Supp. 1183 (S.D.Miss. 1987) 17

McCain v. Lybrand, 465 U.S. 236 (1984) 3, 10

Morris v. Gressette, 432 U.S. 491 (1977) 6, 9

NAACP v. Hampton County Election Comm'n, 470 U.S. 166 (1985) 10

Perkins v. Matthews, 400 U.S. 379 (1971).....3, 12

Rogers v. Lodge, 458 U.S. 613 (1982)..... 12

SCLC v. Siegelman, 714 F.Supp. 511 (M.D.Ala. 1989)..... 16

Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975) 4

Ward v. Regents of University System of Georgia, 191 F.Supp. 491 (N.D.Ga. 1957) 4

Williams v. State Board of Elections, 696 F.Supp. 1563 (N.D. Ill. 1988)..... 17

TABLE OF AUTHORITIES – Continued

Page

STATUTES, RULES & REGULATIONS

42 U.S.C. §1971, et seq ("Voting Rights Act")..... 16

42 U.S.C. §1973(b)..... 16

42 U.S.C. §1973c, Section 5 of the Voting Rights Act..... *passim*

28 C.F.R. §51..... 6

28 C.F.R. §51.13.....10, 12

O.C.G.A. §21-2-135..... 7

O.C.G.A. §21-2-284.1..... 7

O.C.G.A. §21-2-285.1..... 7

O.C.G.A. §21-2-501..... 7

OTHER AUTHORITIES

S. Rep. 94-295, 94th Cong., 1st Sess. (1975)..... 13

No. 90-332

In The

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GEORGIA STATE BOARD OF ELECTIONS and MAX CLELAND, Secretary of State and Chairman of the Georgia State Board of Elections,

Appellants,

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TYRONE BROOKS, LANETT STANLEY, BILL McKINNEY, JOE BEASLEY, VENUS E. HOLMES, MICHAEL ROBINSON, EDWARD BROWN, REV. DR. WILLIAM HOWELL, JOHN WHITE, MARY YOUNG-CUMMINGS, MARY BLACK, WILLIE MAYS, WILLIAM YOUNG, DEANIE FRAZIER, DIANE HARVEY-JOHNSON, REV. G.L. AVERY, JUANITA T. WILLIAMS, PATRICIA C. JONES, EDITH INGRAM GRANT, HENRY COOK, ANNIE SMITH, AND ERCEL BALDWIN,

Appellees.

On Appeal From The United States District Court For The Southern District Of Georgia

MOTION TO AFFIRM

STATEMENT OF OBJECT

Pursuant to Rule 18.6, Appellees move to affirm the judgment[1] sought to be reviewed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. The decision entered on the merits below is based on well-settled law established by this Court, and there is no conflict which requires this Court's resolution.

QUESTIONS PRESENTED

Appellants set forth three questions for consideration in this appeal. Questions I and III, concerning the scope of Section 5 of the Voting Rights Act (42 U.S.C. §1973c), have already been conclusively answered by this Court, and present no new issue for decision. Question II, alleging that the district court and/or the Attorney General have imposed an "affirmative duty" to change voting practices to "maximize minority voting strength," is not presented by the record below. The district court merely determined that the voting changes had the "potential for discrimination," and therefore required preclearance. The Attorney General's objection (which is not before this Court) was grounded upon a finding that those voting changes would "dilute" or "minimize" black voting strength. No affirmative obligation was imposed upon a

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[1] Appellees have appealed the remedy portions of the district court's final order. *Brooks v. Georgia State Board of Elections*, No. 90-272. Appellees have no quarrel, however, with the court's resolution of the merits.

covered jurisdiction by either the district court or the Attorney General to "maximize" black voting power.

STATEMENT OF FACTS

Appellants' Statement of Facts

The Statement of Facts, as presented by Appellants in this case, is rife with misleading and erroneous assertions and requires correction.

As a matter of law, the only issues before a three-judge court in a Section 5 proceeding are whether the jurisdiction is covered by the statute; whether the change affects voting; and whether that change has been precleared. *Perkins v. Matthews*, 400 U.S. 379, 383-84 (1971); *McCain v. Lybrand*, 465 U.S. 236 (1984). "[I]t is neither the function nor the prerogative of . . . a three judge court" to determine "whether a covered change does or does not have the purpose or effect 'of denying or abridging the right to vote on account of race or color.' " *Perkins, supra*, 400 U.S. at 384-85.

In accordance with this well-settled law, the district court did not make any determinations concerning whether the statutes themselves, or the method of electing superior court judges, had a racially discriminatory effect. Appellants' assertions that the "undisputed evidence shows that there has been no discrimination in either the election or the appointment of superior court judges in the State of Georgia" (J.S. 7), and that the "lower court did not find . . . that the method of electing superior court judges has somehow discriminated against

black judicial candidates in Georgia" (Id.) are highly misleading. The district court had no authority to make any such findings, nor to engage in an "assessment of Georgia's electoral practices," as Appellants imply (J.S. 8). Such an assessment is the exclusive province of the Attorney General and the District Court for the District of Columbia in preclearance proceedings. Similarly, most of the evidence which Appellants recite in their Statement of Facts which purportedly supports the absence of discrimination is evidence which they presented to the *Department of Justice*, as part of the preclearance process, not to the local district court. The appendix citations (App. 58-76) are to a letter from the State of Georgia to the United States Attorney General, not to findings of the district court.[2] Other "factual" assertions are made totally

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[2] The facts asserted, such as the percentage of qualified black attorneys who have been appointed or elected to the superior court bench, are themselves irrelevant to the question as to whether the method of election discriminates against black citizens. This is a voting rights case, not an employment discrimination action. It is the right of black voters to elect candidates of their choice – be they black or white – that is being abridged, not the right to black attorneys to become judges.

Further, the statistics, even if relevant, would not demonstrate racial fairness. The paucity of black lawyers in the state with seven years experience is due in large measure to historic discrimination against black citizens by law schools, *Holmes v. Danner*, 191 F.Supp. 394 (M.D.Ga. 1961), *Ward v. Regents of University System of Georgia*, 191 F.Supp. 491 (N.D.Ga. 1957), bar examiners, *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975), (noting that "black applicants as a class have traditionally experienced particular difficulty in passing the Georgia bar examination," and that "in July 1972 . . . each of the 40 black applicants taking the examination failed") and state and local bar associations.

without citation, and appear nowhere in the record (see, e.g., J.S. 8). What Appellants tout as the "absence of any evidence of discrimination in the election or appointment" of judges (J.S. 8-9) is the product *not* of a racially fair system or fact-finding favorable to the State, but of the recognition, by both Appellees and the district court, of the limited scope of that court's jurisdiction.

Appellants' statements concerning the findings of the Attorney General are also inaccurate. According to Appellants,

> The Department did not find, nor could it have found, that the addition of these judgeships was somehow racially discriminatory, nor did the Department suggest that black voters were in any way disadvantaged by the creation of new judgeships.

(J.S. 9). To the contrary, such findings, stated in the statutory terms of the State having the burden of proof, were the very gravamen of the Section 5 objection. After reviewing all the evidence submitted, the Attorney General concluded that the state had not "carried its burden of showing that the expansion of an electoral system, which includes the restrictive majority vote and designated post features, through the additional judgeships under review here" has "neither a discriminatory purpose nor a discriminatory effect." App. 81.[3]

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[3] The Attorney General's determination is not before this Court and cannot be reviewed on this appeal. However much Appellants might wish to reargue the racial merits of their judicial election practices, the Attorney General's decision

(Continued on following page)

One further clarification is required. The three-judge court, in its order entered December 1, 1989, did not "direct" the State to complete its submission to the Department of Justice (J.S. 9). Rather, the court, consistent with the limits of its power, gave the State thirty days within which to provide the requested information to the Attorney General, and specified affirmative relief should Defendants fail to seek reconsideration (App. 19-21).

Relevant Facts Relied Upon By Appellees On This Motion

Georgia is a "covered jurisdiction" under the provisions of Section 5 of the Voting Rights Act, 42 U.S.C. §1973(c); 28 C.F.R. §51. Any change in a standard, practice or procedure with respect to voting must therefore be precleared by the Attorney General of the United States or the District Court for the District of Columbia before the change may be lawfully implemented.

(Continued from previous page)

denying Section 5 preclearance is not subject to judicial review. *Morris v. Gressette*, 432 U.S. 491, 504 (1977).

The State has now filed a declaratory judgment action seeking preclearance by the United States District Court for the District of Columbia. It is that judgment, not this, that would present this Court on appeal with the opportunity to review a determination that the State had not carried its burden of demonstrating that the method of electing Georgia's newly created superior court judgeships has neither a discriminatory purpose nor a discriminatory effect. All that is now presented is whether the district court properly determined that the addition of elected judgeships is a covered change under Section 5 of the Voting Rights Act.

Georgia elects its superior court judges. Election is at-large by all electors within the judicial circuit, using numbered posts and a majority vote requirement. O.C.G.A. §§21-2-284.1 and 285.1, §21-2-135 and §21-2-501. There are 45 judicial circuits, ranging in size between one and eight counties. The number of judges elected in each circuit ranges from one to 14. All of the circuits have a majority white voting age population.

Between 1965 and 1988, Georgia enacted statutes creating 77 judgeships of the superior court, as well as five new circuits. Each statute, by its terms, creates the new judicial seat; establishes the date on which the first election for that seat shall be held (often resulting in the staggering of election terms within the circuit); provides for interim appointment by the governor; and creates a new election post to appear on the ballot within the particular judicial circuit. See, e.g., H.B. No. 721, App. 97-99. Thirty-two (32) of the statutes enacted during this period added judges to circuits that, prior to November 1, 1964, were single-member districts, thereby creating multi-member judicial circuits.

Despite the preclearance requirement, Georgia implemented each of these election statutes without first obtaining preclearance. Positions were established, judges were appointed, subsequent elections were conducted, and vacancies were filled, all without complying with Section 5. All of the unprecleared judgeships are now held by incumbents who were appointed or elected after the decision in *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C 1985) (3 judge), *summarily aff'd* 477 U.S. 901 (1986), in which this Court held that changes in the number and manner of election of judges are changes

requiring preclearance under Section 5 of the Voting Rights Act.

It was not until June 27, 1988 that the State submitted any of the judicial election changes for preclearance. Those in areas of the state having few black citizens were precleared, while the Attorney General requested additional information concerning the other changes. At that point the State took the position that changes affecting the election of judges were not covered by Section 5 and refused to send the requested information. The Attorney General entered a Section 5 objection which the Appellees sought to enforce before the three-judge court in this case. The three-judge court ruled that the disputed changes were subject to Section 5 and the State eventually submitted the additional information. However, the Department of Justice objected to the creation of each new judgeship in circuits having a significant black population, on the grounds that the State had not carried its burden of demonstrating that the submitted changes had "neither a discriminatory purpose nor a discriminatory effect." (App. 81).

In 1989 and 1990, the Georgia General Assembly created eleven additional judgeships. Implementation of 10 of those 11 judgeships has been enjoined by the three-judge court, together with any further elections for those unprecleared judicial posts that had already been implemented.

ARGUMENT

I. The Creation of An Elected Position Is A Covered Change Under Section 5 of the Voting Rights Act

The issue presented by this appeal is simple and straightforward: did the three-judge district court correctly conclude that the creation of additional elected judgeships is a change covered by Section 5 of the Voting Rights Act, 42 U.S.C. §1973c? This case does not, as the State contends, involve review of the standards used by the Department of Justice in denying preclearance. (J.S. 10, 13). As noted previously, the merits of the Attorney General's decision is not before the Court. Further, the Court has made it clear that Section 5 decisions of the Attorney General, as opposed to those of the District Court for the District of Columbia, are not subject to judicial review. *Morris v. Gressette*, 432 U.S. 491 (1977). Nor does this case involve the "roving, plenary power to review, enjoin, or modify every election practice that might exist in covered jurisdictions" (J.S. 17), nor does it "affirmatively mandate new electoral practices." (J.S. 18). The *only* voting changes found by the district court to be subject to Section 5 (and the *only* voting changes objected to by the Attorney General) were the creation of additional elected judgeships. No other voting practice of the State has been ordered to be submitted for Section 5 review, enjoined or modified in any way, including the State's general majority vote and numbered post requirements, and no new electoral practices have been mandated. The State has merely been ordered by the district court to comply with Section 5. The efforts of the State to present this case as something that it is not are unavailing.

The decision of the district court, finding that the addition of elected judgeships to existing superior court circuits required preclearance, was fully consistent with settled law.[4] This Court has repeatedly held in similar cases that the addition of elected officials to existing public bodies requires Section 5 preclearance. *City of Port Arthur v. United States*, 459 U.S. 159 (1982) (expansion in the size of a city council requires preclearance); *City of Lockhart v. United States*, 460 U.S. 125 (1983) (addition of two seats to a local governing body is a "covered change"); *McCain v. Lybrand*, 465 U.S. 236 (1984) (increase in number of council members is a covered change).

More specifically, this Court, as well as every court which has considered the question, has held that the creation of additional judgeships, including the addition of judges to existing circuits, is covered by Section 5 without regard to the fact that the additional judges would be elected under preexisting state procedures. *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985), *aff'd*, 477 U.S. 901 (1986) (enjoining, *inter alia*, the enforcement of Chapter 1109, Session Laws of 1983, creating additional judgeships in four circuits whose existence predated the

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[4] It would be a complete anomaly, contrary to logic as well as precedent, to hold that changes such as the moving of a polling place, 28 C.F.R. §51.13(d), or the annexation of vacant land, *City of Pleasant Grove v. United States*, 497 U.S. 462 (1987), or the rescheduling of a candidate qualifying period, *NAACP v. Hampton County Election Commission*, 470 U.S. 166, 176, 178 (1985) were changes affecting voting, but that the creation of 48 entirely new elected offices was not. *See, Blanding v. DuBose*, 454 U.S. 393 (1982) and *McCain v. Lybrand, supra*, applying Section 5 to the creation of elected offices from appointed positions.

Voting Rights Act); *Clark v. Roemer*, Civ. No. 86-435-A (M.D.La Aug. 29, 1988) (enjoining, *inter alia*, the enforcement of "Act 801 of 1987 which created one additional judgeship for the Second Circuit Court of Appeal and three additional judgeships for the Third Circuit Court of Appeal"); *Kirksey v. Allain*, Civ. No. J85-0960(B) (S.D.Miss. April 3, 1986) (enjoining operation of 30 statutory enactments which merely added new judgeships to multimember circuits having a pre-existing practice of numbered posts, majority vote and circuit-wide voting).

Section 5 of the Voting Rights Act requires that *any* change in a "standard, practice or procedure with respect to voting" be precleared, by the Attorney General or the United States District Court for the District of Columbia, prior to its implementation. 42 U.S.C. §1973c. Congress intended for Section 5 to reach "any state enactment which altered the election law of a covered State in even a minor way." *Dougherty County, GA Board of Education v. White*, 439 U.S. 32, 37 (1978). Section 5 is to be given the "broadest possible scope," reaching "all changes, no matter how small." *Allen v. State Board of Elections*, 393 U.S. 544, 566-568 (1969).

The creation of additional superior court judgeships is unqestionably a voting change within the meaning of Section 5. By increasing the number of judicial seats within existing judicial circuits, the State of Georgia has created new electoral offices for which voters may cast ballots, and it has established additional seats from which judicial candidates may choose in deciding to run for office. Voters are affected because they will have additional candidates from which to choose. Prospective candidates are affected because the creation of an additional

judgeship may mean that a challenger will not have to face a long-time incumbent.

Moreover, the judicial statutes in question do not merely increase the number of elected judgeships within the State. They also create staggered terms of office, and implement (in many cases) new systems of multi-member district elections. Each of these features itself renders the statutes "covered changes" under established law.

Staggered terms limit the number of seats to be filled at any given election by having positions expire in different years, and have long been held subject to preclearance. *City of Rome v. United States*, 446 U.S. 156, 185 (1980); *Berry v. Doles*, 438 U.S. 190 (1978). *See also* 28 C.F.R. §51.13, listing "staggering the terms of office" as an example of a covered voting change.

Changes from district to at-large elections also fall squarely within the scope of Section 5. *Allen v. State Board of Elections*, 393 U.S. 544, 566-67 (1969); *Perkins v. Matthews*, 400 U.S. 379, 387-90 (1971); *Rogers v. Lodge*, 458 U.S. 613, 616 (1982) ("At-large voting schemes and multi-member districts tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* representatives of the district.") *See also*, 28 C.F.R. §51.13(e), giving as an example of a covered voting change "changing to at-large elections from district elections." The judicial election statutes at issue in this case implemented new systems of multi-member district elections in twenty-four (24) circuits, by adding judgeships to circuits in which the judge was previously elected from a single-member circuit.

That the voting changes at issue were implemented in the context of pre-existing voting procedures such as a majority vote requirement or circuit-wide elections does not remove them from the scope of Section 5. Rather, Section 5 requires that the entire procedure for election of judges be subjected to review. S. Rep. 94-295, 94th Cong., 1st Sess. 19 (1975) ("In some Section 5 cases, a change in the voting practice or procedure may also retain some features of the previous system, and all aspects of such a change are within the reach of Section 5.") More relevant to this proceeding, the local three-judge court is similarly required to consider the context in which a change will be implemented to determine if it has the potential for discrimination. Any other rule would require a court enforcing Section 5 to behave like an ostrich and to ignore "the reality of changed practices as they affect Negro voters," *Georgia v. United States*, 411 U.S. 526, 531 (1973), which this Court has expressly directed it to consider.

It is well-settled that the Attorney General, in assessing the purpose or effect or a voting change under Section 5, must examine the change in the *context* of other, pre-existing voting procedures. *See City of Richmond v. United States*, 422 U.S. 358 (1975); *City of Petersburg v. United States*, 410 U.S. 962 (1973) [affirming 354 F.Supp. 1021 (DDC 1972)]. Appellants' argument that the Attorney General (or District Court for the District of Columbia) has no authority to do so has already been squarely considered and rejected by this Court. In *City of Lockhart v. United States*, 460 U.S. 125 (1983), the city government had previously consisted of a mayor and two commissioners, elected at-large using numbered posts. Both the at-large and numbered post features were permissible,

pre-existing practices, just as the majority vote requirement, circuit-wide elections, and numbered posts in the instant case. In 1973, two additional seats were added to the council, and terms were staggered. The city, like Appellants here, argued that the continued use of numbered posts could not be scrutinized under Section 5. This Court soundly rejected that position, explaining:

> In moving from a three-member commission to a five-member council, Lockhart has changed the nature of the seats at issue. Council posts one and two are not identical to old commission posts one and two. For example, they now constitute only 40% of the council, rather than 67% of the commission. Moreover, one cannot view these seats in isolation, for they are an integral part of the council. The possible discriminatory purpose or effect of the new seats, admittedly subject to §5, cannot be determined in isolation from the "pre-existing" elements of the council. Similarly, the numbered-post system is an integral part of the new election plan. The impact of any of the seats cannot be evaluated without considering the fact that they are all filled in elections using numbered posts. We therefore hold that the entire system introduced in the 1973 charter is subject to preclearance.

460 U.S. at 131-32. *See also City of Port Arthur v. United States*, 459 U.S. 159, 162 (1982) (denying preclearance to an expansion in the size of a city council, although the city continued to use pre-existing at-large voting and a majority vote requirement for the added seats).

Contrary to Appellants' assertion, such a procedure is not an unending "re-review" of previously approved methods of election. The Attorney General does not – and cannot – invalidate pre-existing or precleared procedures,

such as Georgia's majority vote requirement. He merely evaluates the effect of the new change in the context in which it will be implemented, to determine whether the change before him should be precleared. By the same token, a local three-judge court in enforcing Section 5 must consider the context in which a voting change will be implemented to determine its potential for discrimination.

There can be no doubt that the question which Appellants seek to present has been decisively and conclusively resolved by this Court on numerous occasions, and that no purpose would be served by full briefing and argument.

II. *HAITH v. MARTIN* PROPERLY DECIDED THE SCOPE OF SECTION 5 AND THERE IS NO BASIS FOR RECONSIDERATION

Section 5 of the Voting Rights Act requires preclearance of "*any* voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." 42 U.S.C. §1973c. There is absolutely no basis, in either the language of 42 U.S.C. § 1973c or its legislative history, for concluding that changes affecting the election of judges should be treated any differently than any other voting change. This Court, in affirming the district court's decision in *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985), merely underscored the obvious.

There has been no "resulting confusion" either in the state legislatures or in any Federal court concerning the application of Section 5 to judicial elections. Every court

which has considered the question has followed this Court's summary affirmance, and required Section 5 compliance. *Kirksey v. Allain*, 635 F.Supp. 347 (S.D.Miss. 1986) (three-judge court); *Clark v. Roemer*, Civ. No. 86-345-A (M.D.La. 1988); *Brooks v. State Board of Elections*, Civil Action No. CV288-146 (S.D.Ga. Dec. 1. 1989).

The only "confusion" is that which the State itself is attempting to create, by merging arguments concerning the scope of Section 2 of the Voting Rights Act with its discussion of the proper scope of Section 5.[5] Whether judicial election procedures are exempt under Section 2 of the Voting rights Act, 42 U.S.C. § 1971, et seq., is a wholly different question from whether judicial voting changes are "covered" under Section 5, and is not presented by this appeal.[6]

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[5] Section 2, unlike Section 5, contains the word "representative." A violation of Section 2 is established if members of a protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). Defendants in Section 2 cases have therefore argued – without success – that since judges are not "representatives," Section 2 of the Voting Rights Act has no application to judicial elections. No such argument is available under Section 5.

[6] Appellees would point out, however, that even as to the proper scope of Section 2 of the Voting Rights Act there is no confusion among the courts. Every court which has had the last word on the question has concluded that Section 2 *does* apply to judicial elections. See, e.g. *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir.), *cert. den.* 109 S.Ct. 390 (1988); *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988); *SCLC v. Siegelman*, 714 F.Supp. 511

(Continued on following page)

CONCLUSION

For the foregoing reasons, the judgment below, holding that the addition of elected judgeships to Georgia's superior court are covered changes requiring Section 5 preclearance, should be affirmed.

Respectfully submitted,

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(M.D.Ala. 1989); *Clark v. Roemer*, No. 86-435-A (M.D.La. 1988); *Williams v. State Board of Elections*, 696 F.Supp. 1563 (N.D.Ill. 1988); *Martin v. Allain*, 658 F.Supp. 1183 (S.D. Miss. 1987) The only opinion holding that there are any limits on Section 2's application to judicial elections is *League of United Latin American Citizens Council v. Clements*, 902 F.2d 293 (5th Cir. 1990), cited by Appellants. That panel opinion, which created an exception for *trial* judges, was *vacated* by the full 5th Circuit *sua sponte*, and has absolutely no precedential value. *Id.*, at 902 F.2d 322.

A BILL TO BE ENTITLED

AN ACT

To provide for an additional judge of the superior court of the Atlanta Judicial Circuit; to provide for the initial appointment and subsequent election of such judge and of his successors; to provide for terms; to prescribe the powers of said judge; to prescribe the compensation and allowances of said judge; to amend Code Section 15-6-2 of the Official Code of Georgia Annotated, relating to the number of superior court judges for each of the judicial circuits, so as to provide an additional judge of the superior court of the Atlanta Judicial Circuit; to provide a conditional effective date; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

Section 1. Code Section 15-6-2 of the Official Code of Georgia Annotated, relating to the number of superior court judges for each of the judicial circuits, is amended by striking paragraph (3) of said Code Section in its entirety and inserting in lieu thereof a new paragraph (3) to read as follows:

"(3) Atlanta Circuit.....13"

Section 2. A new judge of the superior court is added to the Atlanta Judicial Circuit, thereby increasing to 13 the number of judges of said circuit.

Section 3. The initial judge appointed by this Act shall be appointed by the Governor for a term beginning July 1, 1989 and expiring December 31, 1990, and until a successor is elected and qualified. A successor to the

initial judge shall be elected in a manner provided by law for the election of judges of the superior courts of this state at the general election in November, 1990 for a term of four years beginning on January 1, 1991, and until the election and qualification of a successor. Future successors shall be elected at the general election each four years thereafter for terms of four years and until the election and qualification of a successor. They shall take office on the first day of January following the date of the election. Such election shall be held and conducted in a manner provided by law for the election of judges of the superior courts of this state.

Section 4. Said additional judge shall have and may exercise all powers, duties, dignity, jurisdiction, privileges, and immunities of the present judges of the superior courts of this state. Any of the 13 judges of the superior court of said circuit may preside over any case therein and perform any official act as judge thereof.

Section 5. The compensation, salary, and contingent expense allowance of said additional judge shall be the same as that of the other judges of the superior court of the Atlanta Judicial Circuit. Any salary supplements heretofore enacted by the county of said circuit shall also be applicable to the additional judge provided for in this Act.

Section 6. This Act shall become effective only if specifically funded and, if so funded, this Act shall become effective upon the later of: (1) its approval by the Governor or its becoming law without his approval; and (2) the enactment into law of legislation appropriating funds specifically designated in the act appropriating the

same as being for the purpose of funding the additional judgeship provided for in this Act.

Section 7. All laws and parts of laws in conflict with this Act are repealed.